UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SOS INTERNATIONAL LLC,	)	
	)	
SOSi,	)	
	)	Case Nos. 21-CA-178096
And	)	21-CA-185345
	)	21-CA-187995
PACIFIC MEDIA WORKERS GUILD, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 39521, AFL-CIO,	)	
	)	
Charging Party	)	

RESPONDENT'S POST-HEARING BRIEF

NOW COMES SOS International LLC, (SOSi), Respondent herein, and files its post-hearing brief as follows:

STATEMENT OF CASE

This case arises out of a series of unfair labor practice charges filed against SOSi by Pacific Media Workers Guild Local 39521 (Union). The initial charge, filed on June 7, 2016, alleged that SOSi had violated § 8(a)(1) of the Act by misclassifying interpreters as independent contractors.[1] (General Counsel ["GC"] Exh. 1(a)). The second charge, filed on September 30, 2016 and later amended on December 15, 2016; January 31, 2017; February 22, 2017; February 24, 2017; March 2, 2017; and March 14, 2017, alleged, as amended, that SOSi had violated §§ 8(a)(1) and (3) of the Act by discriminating against and terminating certain interpreters for

[1] On October 3, 2016, the Regional Director approved the Charging Party's request to withdraw all of the allegations alleged in this charge except for the one pertaining to the misclassification of the interpreters as independent contractors.

engaging in protected, concerted activities.[2] (GC Exh. 1(d), (g), (j), (m), (p), (s), and (v)). This charge additionally alleged that SOSi, through an agent and supervisor, had violated §§ 8(a)(1) and (3) of the Act by interrogating, surveilling, giving the impression of surveillance, and impliedly threatening interpreters for engaging in protected, concerted activities. (*Id.*) The same charge further alleged that SOSi had violated § 8(a)(1) of the Act by maintaining unlawful agreements or contract provisions within interpreters' independent contractor agreements with SOSi, including a Confidentiality Agreement for Contractors, Publicity Clause, Code of Business Ethics and Conduct, and Code of Professional Responsibility.[3] (*Id.*) The third charge, filed on November 9, 2016, alleged that SOSi, through its agents and supervisors, had violated §§ 8(a)(1) and (3) of the Act by threatening legal action, retaliating against, and terminating certain interpreters for discussing and reporting a breach of SOSi's confidential, private data. (GC Exh. 1(y)).

On May 31, 2017, the Regional Director issued a Consolidated Complaint based on the allegations in these three charges.[4] (GC Exh. 1(bb)). SOSi filed a timely Answer on June 12,

[2] On April 28, 2017, the Regional Director approved the Charging Party's request to withdraw certain additional allegations pertaining to other interpreters and certain company employees, namely Maria Ayuso and Martin Valencia. The Region formally dismissed those allegations in a dismissal letter that same day. No appeal was filed.

[3] On January 29, 2018, Counsel for the General Counsel informed Respondent via email that the Region had re-examined Paragraphs 16 and 18 of the Consolidated Complaint pertaining to the Confidentiality Agreement and Code of Professional Responsibility following the Board's decision in *The Boeing Company*, 365 NLRB No. 154 (December 14, 2017) and has decided to withdraw these two paragraphs from the Complaint as a result. It is expected that the request for withdrawal will be noted in the General Counsel's post-hearing brief. For completeness, however, Respondent addresses these allegations herein.

[4] On October 10, 2017, Judge Rosas granted the General Counsel's Motion to Withdraw Paragraphs 9 and 13 of the Consolidated Complaint, which concerned allegations made by interpreter Ismail Charania. (Tr. 984-985).

2017, denying the material allegations of the Consolidated Complaint and raising certain affirmative defenses, including that the interpreters are independent contractors, and therefore, excluded from the Act's coverage. (GC Exh. 1(dd)). A hearing was conducted before Administrative Law Judge Michael A. Rosas in Los Angeles, California on September 25, 26, 27, 28 and 29, and in Washington, D.C. on October 10, 11, and 12, 2017. SOSi now files its post-hearing brief.

STATEMENT OF FACTS

A. Background

SOSi provides linguistics, logistics, construction, training, intelligence and information technology services in the government contract industry internationally and throughout the United States. It provides these services pursuant to numerous government contracts, serving the United States defense, intelligence, law enforcement, and diplomatic agencies. SOSi maintains its operational headquarters in Reston, Virginia.

This case involves SOSi's language interpreter services program with the United States Department of Justice ("DOJ"), Executive Office for Immigration Review ("EOIR"), Language Services Unit ("LSU"). In July 2015, SOSi acquired a government contract with the EOIR to provide all United States Immigration Courts ("Immigration Courts") across the country with foreign language interpretation services (the "EOIR Contract"). (JX 1(a), Tr. 1043-1044). Prior to SOSi's acquisition of the EOIR Contract, similar interpretation services had been provided to the Immigration Courts for more than 15 years by the long-term incumbent, Lionbridge, and other predecessor companies. (Tr. 1045, *see also* Tr. 712-714). SOSi, like its predecessors, delivers interpretation services to the Immigration Courts by using freelance interpreters with whom it enters into individual contracts denominated as "Independent Contractor Agreements"

or "ICAs". Throughout the entire history of the EOIR contract interpreter program, interpreters have always been classified as independent contractors. (*See* Tr. 304, 324). Until this case, their classification as independent contractors had never been questioned.

B. EOIR Immigration Courts

The EOIR is a separate agency within the DOJ responsible for adjudicating immigration cases in the United States, and it oversees Immigration Courts through the Office of the Chief Immigration Judge. (Joint Exh. ["JX"] 1(a) ¶ C.2, JX 1(f) ¶ C.2).[5] Pursuant to the EOIR Contract, the Office of the Chief Immigration Judge ("OCIJ"), oversees all the Immigration Courts and their proceedings, and the Chief of Language Services Unit ("LSU") within the OCIJ exercises "general oversight of . . . the contract interpreter program . . ." (JX 1(a) ¶ C.2(a)(1), ¶ C.2(d), JX 1(f) ¶ C.2(a)(1), ¶ C.2(d)). The OCIJ provides "overall program direction, articulates policies and procedures, and establishes priorities for the Immigration Court[s]." (*Id.* ¶ C.2(b)).

Some 300,000 immigration matters are heard by the Immigration Courts each year. (JX 1(a) ¶ C.2(b), JX 1(f) ¶ C.2(b)). Interpreters are required to interpret in immigration court proceedings when an alien's command of the English language is insufficient to fully understand and participate in the proceeding. (*Id.* ¶¶ C.1, C.2). To meet its need for interpreters, the EOIR uses staff interpreters, contract interpreters such as those engaged by SOSi, and unscheduled telephonic interpretation services by other government contractors.[6] (*Id.*) The LSU, in

[5] According to the DOJ website, EOIR was created on January 9, 1983, as part of an internal DOJ reorganization. EOIR is headed by a Director, who reports directly to the Deputy Attorney General. EOIR's headquarters are located in Falls Church, Virginia.

[6] In July 2015, EOIR employed 70 staff interpreters, primarily Spanish. (JX 1(a) ¶ C.2(d)). In September 2017, it employed 63 staff interpreters, also primarily Spanish. (JX 1(f) ¶ C.2(d)).

conjunction with the OCIJ and court administrators, oversee both staff and contract interpreters at the Immigration Courts. (JX 1(a) ¶ C.2, JX 1(f) ¶ C.2; Tr. 770-773, 776).

The majority of cases at the Immigration Courts are "removal proceedings," which are adjudicated in two steps. (JX 1(a) ¶ C.2(c), JX 1(f) ¶ C.2(c)). First, an alien (or respondent) attends a "master calendar hearing," where the judge preliminarily explains the purpose of the proceeding and the alien's rights. (*Id.*, Tr. 147-148). Following this initial hearing, the alien's case is set for an individual "merits hearing," where the judge receives evidence and hears testimony from the alien and witnesses for each party. (*Id.*) Merits hearings typically last between one and three hours, and depending on the circumstances, either involve detained aliens (i.e., within the government's custody) or non-detained aliens (i.e., not within the government's custody). (JX 1(a) ¶ C.2(c), JX 1(f) ¶ C.2(c)). Interpreters informally refer to hearings either as "detainee" cases or as "non-detainee" cases, respectively. (Tr. 28).

C. DOJ EOIR Contract

SOSi acquired the EOIR Contract on July 13, 2015. (JX 1(a), JX 1(f)). It is a five-year government contract with an initial one-year term that ran from September 1, 2015 through August 31, 2016, with four additional option years. (JX 1(a) ¶ B.1, Tr. 1078). To extend the term of the EOIR Contract beyond its initial year, EOIR must affirmatively do so annually at the end of each contract year in August. (*See* JX 1(d), Tr. 1078). SOSi's performance under the EOIR Contract did not begin immediately as there was a period of transition between Lionbridge and SOSi. From September 2015 through November 30, 2015, SOSi performed limited work orders at Immigration Courts located in Baltimore, Maryland and Philadelphia, Pennsylvania. (Tr. 1044, 1367). SOSi began performing at Immigration Courts nationwide on December 1, 2015. (Tr. 1044, 1374).

The EOIR Contract establishes a number of standards, procedures, and requirements that the federal government imposes on all interpreters working in the Immigration Courts. (Tr. 1056-1058, 1069-1070). For instance, the EOIR Contract obligates SOSi to ensure that all interpreters possess the necessary qualifications and skills to satisfactorily render their services at the Immigration Courts. (JX 1(a) ¶ C.3.5, JX 1(f) ¶ C.3.5). Section C.3.5 of the EOIR Contract states that interpreters must be:

(1) U.S. citizens or lawful permanent residents of the United States;

(2) Certified for judicial interpreting or have at least one year of experience in a judicial environment;

(3) Highly proficient in the vocabularies of both English and the foreign language (including EOIR-immigration vocabulary) and fluent in both languages;

(4) Knowledgeable of the Code of Professional Responsibility for interpreters and protocol of court interpreting;

(5) Skilled at simultaneous and consecutive interpretation, and sight translation;

(6) Able to effectively convey the tone and emotional level of the speaker; and

(7) Able to maintain the appropriate speed and projection while interpreting.

(*Id.*) To meet these requirements, interpreters are responsible for maintaining their proficiency levels and acquiring any necessary certifications or experience to work as an EOIR interpreter. (*Id.*, Tr. 586).

For the first year of the EOIR Contract, SOSi utilized only former Lionbridge interpreters, as these interpreters (except for some who had been disqualified by LSU) were deemed ready to work ("RTW") once they entered into a contract with SOSi. No additional screening, training, or approval was required. (Tr. 1055, 1142-1143). SOSi's plan was to hit the

ground running with the incumbent interpreters and supplement this incumbent workforce, as needed, with additional, non-incumbent interpreters all the while continuing its ongoing recruiting efforts to broaden the base of willing and qualified interpreters. (*See* Tr. 1044-1045). Many of the non-incumbent interpreters, however, did not have the one year judicial experience or certification required by EOIR. Thus, SOSi, over an extended period of time, developed, with EOIR's approval, a process for obtaining qualified new interpreters. (Tr. 1059-1063). This process involved an initial screening test developed and administered by Southern California School of Interpretation ("SCSI").[7] (GC Exhs. 229, 230, 231; Respondent ["R."] Exh. 37; Tr. 1055, 1058-1060). Interpreters who passed the screening test were eligible to receive EOIR-specific training and take a final test to ensure their familiarity with EOIR protocol and terminology and that their language skills were sufficient to meet EOIR standards. (*Id.*; *see also* JX 1(a) ¶ C.3.5, JX 1(f) ¶ C.3.5). To meet the EOIR contractual requirements, the program and test were developed and administered by SCSI for all new interpreters.[8] (Tr. 1059-1060).

For all interpreters who have not performed work in immigrations courts, the EOIR Contract requires SOSi to have a written evaluation conducted of the interpreter's first case assignment to certify that the interpreter's language and interpretation skills are proficient for interpreting in court. (JX 1(a) ¶ C.3.7.2, JX 1(f) ¶ C.3.7.2). This process involves EOIR providing SOSi with a recording of the interpreter's first case, which SOSi must then have

[7] SOSi also used a company named ALTA for screening purposes in lieu of SCSI, although this is no longer the case. (Tr. 1055, 1195).

[8] Former Lionbridge interpreters had obtained certificates from SCSI prior to contracting with SOSi as well. (Tr. 128-129, 316-317, 714, 781-782). The first non-Lionbridge interpreters did not appear on SOSi's Ready-To-Work (RTW) list until September 2016. (Tr. 1073).

evaluated by another qualified interpreter. (*Id.*) SOSi currently contracts out the evaluation function to the Southern California School of Interpretation, although it previously used experienced contract interpreters to perform these evaluations. (Tr. 1168-1171).

The EOIR Contract additionally obligates SOSi to implement a quality assurance plan that has been approved by LSU to ensure that interpreters adequately render their services according to the EOIR's standards. (JX 1(a) ¶ C.3.6, JX 1(f) ¶ C.3.6). For all interpreters, SOSi is required to have regular evaluations of their competencies conducted at least twice[9] a year by a qualified interpreter evaluator. (JX 1(a) ¶ C.3.7.1(b)). SOSi must also maintain a master file containing the necessary current qualification information for each interpreter and be able to furnish the master file to LSU upon request. (*Id.* ¶ C.3.6; *see e.g.*, GC Exhs. 296, 297). SOSi's Quality Management Team, which is comprised of employees who oversee and implement quality controls for the EOIR Contract, manages this evaluation process but does not conduct any actual evaluation of the interpreters' interpretation skills. (Tr. 1051-1052, 1168-1169, 1170-1171).

Pursuant to the EOIR Contract, SOSi must also ensure that all interpreters have sufficient knowledge of the EOIR hearing process, terminology, and procedures. (JX 1(a) ¶ C.3.9, JX 1(f) ¶ C.3.9). To that end, the EOIR Contract requires SOSi to ensure that each interpreter has received, reviewed, and where appropriate, completed and/or signed the following EOIR-authored and adopted documents or actions:

(1) EOIR Immigration Court Interpreter Handbook;

[9] In September 2017, SOSi and the EOIR reduced this requirement to one time per year. (JX 1(f) ¶ C.3.7.1(b)). As of the close of the hearing, SOSi was out of compliance with this provision, and very few former Lionbridge interpreters had ever been evaluated by SOSi. (*See* Tr. 93, 151, 411, 689).

(2) Immigration Court Terminology List;

(3) Attend Immigration Court proceedings . . . and view the Immigration Court orientation video;

(4) Immigration Court Operating Guidelines for Contract Interpreters;

(5) Code of Professional Responsibility[10];

(6) Confidentiality Agreement;

(JX 1(a) ¶¶ C.3.9, 11, H.4(d); JX 1(f) ¶¶ C.3.9, 11, H.4(d)). The EOIR Contract further requires that SOSi provide these documents to interpreters and maintain signed copies of these documents in its records. (*Id.*) All of these documents are prepared by EOIR and SOSi has no discretion to ignore or modify them. (*See id.*)

The Immigration Courts control all requests for interpreters, decide the language required, and set the date, time, and location of the hearing. (*See* JX 1(a) ¶¶ F.6(a), H.2.3(a); JX 1(f) ¶¶ F.6(a), H.2.3(a)). On this point, the EOIR Contract is explicit:

> The Contractor is responsible for providing qualified contract interpreters as required by the Government. *Managing court dockets is the sole responsibility of the Government.* While the Government appreciates information relating to interpreter availability, the Contractor must provide interpreters when and where required by the Government. *The Government requires contract interpreters based on what the Government determines is needed, not based on what the Contractor determines is needed.*

(JX 1(a) ¶ H.2.3(a), JX 1(f) ¶ H.2.3(a) (emphasis added)). Similarly, if a hearing is cancelled or

[10] The Code of Professional Responsibility contains a list of 10 canons that guide interpreters in the performance of their services at the Immigration Courts. (GC Exh. 5, Code of Professional Responsibility for Interpreters, p. 1). By its terms, the Code applies to "all persons, agencies and organizations who administer, supervise[,] use, or deliver interpreting services to the Immigration Courts." (*Id.*) The Code itself is reproduced from the Model Code of Professional Responsibility for Interpreters in the Judiciary, which is prepared by the National Center for State Courts, a non-profit organization charged with improving judicial administration in the United States. (*Id.* at p. 2).

rescheduled, the cancellation or rescheduling is controlled by the courts and later communicated to the interpreter by SOSi. (Tr. 1432; *see also* JX 1(a) ¶ F.6.2(a), JX 1(f) ¶ F.6.2(a)).

The EOIR Contract further requires that interpreters have a completed Certification of Interpretation ("COI") form for all interpreting assignments. (JX 1(a) ¶ C.3.12(a), JX 1(f) ¶ C.3.12(a); Tr. 164). Prior to arriving to court, interpreters must fill out certain portions of the COI form, including the hearing date, location, start time, file number, Immigration Judge's name, and they must also certify that the interpretations to be rendered are accurate. (Tr. 157-158; *see e.g.*, GC Exhs. 8, 221). Once there, the EOIR requires interpreters to check in with the court clerk in advance of the hearing to sign in and obtain the required date stamp on the COI by the clerk's office to verify the time the interpreter arrived. (JX 1(a) ¶ C.3.13(f), JX 1(f) ¶ C.3.13(f); Tr. 140, 157-159)).

Once an interpreting assignment is complete, the presiding judge signs the COI form, noting the start and end time of the hearing. The interpreter must then return to the clerk's office to either be released for the day or assigned to another hearing. (Tr. 161). Prior to an interpreter's release, the court clerk will again time stamp the COI form with the time of the interpreter's departure and sign the bottom of the COI form. (*Id.*) Interpreters must thereafter submit completed COI forms to SOSi to receive payment for each interpreting assignment. (*See* JX 1(a) ¶ C.3.13(d), JX 1(f) ¶ C.3.13(d)).

Pursuant to the EOIR Contract, the EOIR additionally reserves the right to refuse to use any individual interpreter due to "poor performance, inappropriate hygiene/appearance/conduct, security concerns, or any other reason based on a failure to satisfy the requirements of the contract." (JX 1(a) ¶ C.3.8, JX 1(f) ¶ C.3.8, Tr. 1188). Such a refusal is termed a "disqualification." (*Id.*). The process for disqualifying interpreters—including the ultimate

decision on disqualification—is dictated by LSU and the EOIR Contract and is not under SOSi's control. (Tr. 1180-1183, 1188, 1481-1483; *see* JX 2). Typically, the process starts with a judge, attorney, or member of the court's staff lodging a complaint against the interpreter, which is then reviewed by LSU. (*Id.*) LSU then forwards the complaint to SOSi, typically in an email. (*See id.*, Tr. 1190). Depending on the disqualifying conduct, a disqualification may be for only a specific language, alien, judge, or court or for all Immigration Courts nationwide. (Tr. 1191-1195). Once an interpreter has received a disqualification, LSU determines what the interpreter must do, if anything, to be considered for reinstatement, which typically involves undergoing additional training, being retested, and receiving a passing test score. (*See id.*; Tr. 1186, 1196). SOSi may then *request* an interpreter's reinstatement, but LSU makes the determination as to whether the interpreter will be reinstated. (JX 1(a) ¶ C.3.8, JX 1(f) ¶ C.3.8, Tr. 1196, *see* JX 2).

Once SOSi is notified of an interpreter's disqualification, it may not assign the interpreter to any further hearings unless it obtains express permission by LSU to reinstate that interpreter. (JX 1(a) ¶ C.3.8, JX 1(f) ¶ C.3.8, Tr. 1196). If the interpreter's evaluation results are unsatisfactory, SOSi may not assign the interpreter to another hearing unless LSU grants reinstatement in writing. (JX 1(a) ¶ C.3.7.3, JX 1(f) ¶ C.3.7.3). In order to obtain reinstatement, SOSi must submit a written reinstatement request that includes detailed information on the specific actions taken that justify reinstatement, such as confirmation of training, counseling, additional interpreting skills and language proficiency evaluations. (*Id.*) If LSU is satisfied with the actions taken by SOSi and the interpreter, it will typically reinstate the interpreter. (*Id.*; Tr. 1193). Accordingly, both the disqualification and reinstatement processes are started, controlled, and resolved by LSU. (Tr. 1188, 1196, 1481-1483).

The EOIR Contract imposes various administrative restrictions on interpreters who render their services to the Immigration Courts. All interpreters must wear identification badges while present in the Immigration Court: "Interpreters shall have a Contractor-issued photo . . . for all assignments for which they interpret . . . [and] [t]he Contractor shall provide each interpreter with . . . photo identification." (JX 1(a) ¶ C.3.12(a), JX 1(f) ¶ C.3.12(a)). Also, "[i]f the case is not adjourned for lunch, the interpreter shall remain for the duration of the work order unless released earlier by the Government". (JX 1(f) ¶ C.3.12(c), *see* JX 1(a) ¶ C.3.12(c)).

On cancellation and delays, the EOIR Contract provides that "[d]elay or cancellation of a proceeding because of unavailability of a contract interpreter is a major disruption to court operations and a costly occurrence." (JX 1(a) ¶ C.2(e), JX 1(f) ¶ C.2(e)). As such, provisions in the EOIR Contract set forth strict cancellation penalties, which are assessed on SOSi in the event that an interpreter cancels without sufficient notice to the EOIR or LSU. (JX 1(a) ¶ F.7.2, JX 1(f) ¶ F.7.2). While SOSi incorporated these cancellation penalty provisions into the interpreters' ICAs, SOSi never in fact assessed these penalties on any interpreters even though SOSi absorbed these costs. (Tr. 1437).

Moreover, to comply with many of the above requirements, SOSi expressly incorporates certain EOIR Contract and Federal Acquisition Regulation[11] (the "FAR") provisions into the interpreters' ICAs, generally as provisions in the ICAs themselves or attachments. (Tr. 1233-1234, 1262, 1300-1304, *see* GC Exh. 5, Exhibits to ICAs). The FAR requires that "[t]he

[11] The FAR is codified in Parts 1 through 53 of Title 48 of the Code of Federal Regulations (CFRs), and it governs the acquisitions of goods and services by federal agencies, including the DOJ EOIR. (Tr. 1297). It addresses various aspects of the acquisition process from soliciting proposals for a government contract to forming the government contract itself. (*Id.*) FAR Section 52 sets forth the required or optional clauses to be included directly, or incorporated by reference, in a government contract. (Tr. 1297).

Contractor shall select subcontractors (including suppliers) on a competitive basis to the maximum practical extent consistent with the objectives and requirements of the contract."). 48 C.F.R. § 52.244-5(a)

The FAR also requires federal agencies to include terms in their prime contracts obligating their contractors to "flow down" certain FAR requirements to subcontractors, so that subcontractors may be subject to similar requirements as the prime contractor. (Tr. 1233-1234, 1247-1248, 1262, 1297-1306). [12] SOSi's former Senior Subcontracts Manager, Jessica Hatchette, testified that SOSi flowed down the following provisions into the interpreters' ICAs, which are considered "subcontracts" under the EOIR "prime" Contract: the Anti-Kickback Procedures provision, the Annual Compliance Representations and Certifications document (i.e., GC Exh. 180), the Equal Employment Opportunity provision, and the Debarment Certification, among others. (Tr. 1233-1234, 1247-1248, 1262, 1297-1304). SOSi also flows down to each ICA as attachments: the EOIR Immigration Court Interpreter Handbook, Immigration Court Terminology List, Immigration Court Operating Guidelines for Contract Interpreters, Code of Professional Responsibility, and the Confidentiality Agreement for each interpreter to review, acknowledge, and sign. (JX 1(a) ¶¶ C.3.9, 11, H.4(d); JX 1(f) ¶¶ C.3.9, 11, H.4(d); Tr. 1233-1234, 1262, 1300-1304)). All of these documents are provided by the EOIR to SOSi and are required by the EOIR for interpreters to conduct business at the Immigration Courts. (*See id.*)

[12] As it did with the interpreters' ICAs, SOSi flowed down similar FAR provisions into its agreements with other subcontractors, including the Southern California School of Interpretation. (*See* R. Exh. 37, pp. 2-4 [SOSi's Purchase Order Agreement with the Southern California School of Interpretation]).

D. The Structure and Operation of SOSi's Interpreter Program

At the outset of the EOIR Contract, SOSi's day-to-day interpreter operations were overseen by two Senior Program Managers, Claudia Thornton ("Thornton") and Martin Valencia ("Valencia"). On October 31, 2016, Charles O'Brien ("O'Brien") assumed the position of Senior Program Manager, previously occupied by Thornton and Valencia jointly. (Tr. 1042). In this capacity, O'Brien, like Valencia and Thornton, has overall responsibility and authority for the interpreter operations and oversees various department managers, including various regional coordinators. Haroon Siddiqi ("Siddiqi") was the regional coordinator for southern California and Arizona. (Tr. 1041-1042, 1427, JX 1(h) (Organizational Chart)). Regional coordinators like Siddiqi (located in Reston, Virginia) communicate directly with the interpreters by email and cell phone. The essential role of the regional coordinator is to ensure that all EOIR work orders have been assigned to an interpreter. (Tr. 1144-1145, JX 1(g) (Regional Coordinator Assignment Chart); JX 1(vv) (Regional Coordinator Job Description)).

SOSi's main point of contact at the EOIR is the EOIR's Contracting Officer, Pamela Pilz, and her colleagues, most notably Karen Manna ("Manna"), who is the EOIR's Contracting Officer Representative ("COR") and Brett Wiggin ("Wiggin"), the EOIR's Program Analyst for the EOIR Contract. (JX 1(a) ¶ G.1, JX 1(f) ¶ G.1, Tr. 1082-1082, 1379). As the COR, Manna is the individual designated by the government to oversee and coordinate the administration of the EOIR interpreter program with SOSi. (*See id.*) Manna acts as the point person at the EOIR for concerns, issues, or questions that may arise in the course of SOSi's performance under the EOIR Contract. (*Id.*) In their respective roles, Manna or Wiggen raise complaints to SOSi about interpreters, and LSU issues a directive or instruction to SOSi on how to address the particular complaint that is conveyed. (Tr. 1378-1380, 1383, 1386-1389, 1484, *see also* JX 2).

E. SOSi Negotiates With Interpreters

In August 2015, SOSi began attempting to recruit incumbent interpreters who had previously contracted with Lionbridge. (Tr. 1395). The EOIR had already approved contracting with these interpreters, as they had demonstrated the necessary skills and credentials based on their engagement with Lionbridge. (Tr. 1142-1143). What SOSi did not anticipate was the resistance it would meet in contracting with Lionbridge interpreters. The initial ICAs sent out by SOSi were 24 pages long, excluding exhibits, and contained provisions that were designed more for a corporate subcontractor than individual subcontractors. (JX 1(i), Tr. 1367-1368). Also, the hourly rates SOSi was proposing were not well received. (GC Exh. 90).[13] The result was that very few interpreters were signing up. (Tr. 1367-1368).

Further, it quickly became apparent to SOSi that the interpreter community (through email and various forms of social media) had banded together and had adopted a united front. (GC Exh. 108, GC Exh. 111). California was a critical state for SOSi, and negotiations between SOSi and a group of California Spanish interpreters led by Hilda Estrada, Angel Garay, and Diana Illarraza-Hernandez would set the stage for other negotiations (both individually and in groups) throughout the country. (*See* Tr. 1368-1375). To help facilitate these negotiations, interpreters rented an office adjacent to the Immigration Court in Los Angeles. (Tr. 755, 789, 796). The "give and take" of these 2015 negotiations is documented in multiple emails exchanged between SOSi's representatives and the California interpreters, for whom Estrada was the principal spokesperson. (R. Exhs. 3, 11; Tr. 663).

[13] Rosario Espinosa testified that SOSi originally offered her $35 per hour with a 2-hour minimum, which SOSi later raised to $45 per hour. (Tr. 483, 486). Stephany Magana testified that Kaila Northcutt, originally offered her $35 per hour. Magana counter-proposed $45 per hour. (Tr. 377-378). Kathleen Morris testified that she was initially offered $53 per hour. (Tr. 991). As is apparent, SOSi's proposed rates climbed over time as negotiations continued.

On September 3, 2015, Estrada sent out a mass email to the interpreter community describing the "latest" developments, including the following:

> Changes (and improvements) in negotiations are occurring daily. Please share.
>
> Some colleagues are getting the rates they have requested. There is still resistance towards a cancellation fee. We can teach SOSi what they need to learn.
>
> We do not have any updates on special, travel rates.
>
> All languages continue to have set hourly rates with a minimum, half day and full day and cancellation fee. Be ready with your answers, THEY WILL PLAY RATE GAMES. Follow up with your language team. Remember, they are asking about "rate per language per area."

(GC Exh. 109).

On September 8, 2015, interpreter Irma Rosas sent a mass email with the subject "OLD CONTRACT NOTES" to the interpreter community, describing the clauses that she viewed as undesirable in SOSi's ICA. (GC Exh. 161). Rosas questioned why the proposed ICAs were only for one year, when SOSi's EOIR contract was for "5 ½ years." [As explained earlier, the EOIR contract was for one base year with four option years.] Rosas also objected to a proposal from SOSi that permitted it to cancel an assignment by 6:00 p.m. the night preceding the hearing:

> Where do I begin?? They will notify us by 6:00 p.m.??? Where are we going to find another job to cover for this cancelled assignment?? They must think we are idiots or that we are crazy...

With respect to an "exclusivity" clause stating that the "Contractor shall not accept work from, or perform work for, any company other than SOSI in connection with SOSI'S Prime Contract," Rosas queried: "ARE WE NOW BEING CONSIDERED EMPLOYEES??? They can not tell us who to work for or not." Rosas characterized SOSi's proposed rates as "stupid" and objected to the absence of any provision describing payment terms. (GC Exh. 161).

On September 12, 2015, Estrada sent SOSi recruiter Kaila Northcutt an email with the subject "Fwd: Revise Draft." To this email, Estrada attached a one-page document containing actual draft terms, including the following:

> **Compensation and Payment.** Company agrees to pay Contractor the fee(s) set forth in each project assignment for Services.
>
> a. Contractor is entitled to reimbursement of agreed upon expenses, such as mileage, airfare, parking, tolls, ground transportation, lodging, per diem allowance, and compensation for travel time, as applicable, except for any expenses which are pre-paid by Company.
>
> b. In the event an assignment is cancelled after being confirmed, where Contractor is expected to reserve the scheduled time, or while assignment is in progress, then Contractor's fee is payable in whole or in part according to terms agreed upon in advance for each assignment, unless Company offers another similar work assignment and schedule.
>
> c. Payment in full of interpreting fees must be made by Company to Contractor bi-weekly, but no later than 1st and 15th days of each month. Contractor shall not be subject to any additional fees or charges for the processing of the bi-weekly payments.
>
> d. In no event should payment to Contractor be contingent upon payment to Company by the party who commissioned the work.
>
> **Term.** This Agreement remains in effect for the duration of Company's contract with EOIR. Contractor understands and agrees that Company will be utilizing Contractor's Services only on an as needed basis and at Company's discretion. Contractor may, without penalty, decline to accept any offered assignment from Company.
>
> **Termination.** Either Party may terminate this Agreement upon written notice to the other Party 30 days prior to the expiration of the Term of this Agreement. In the event of termination of this Agreement, Contractor must provide Company, and Company must pay Contractor for all Services performed and expenses incurred through the date of termination; Company is not obligated to pay Contractor any other compensation, severance, or other benefit whatsoever.
>
> **Non-Exclusivity.** Company acknowledges that Contractor may perform services for other customers, persons, or companies during the term of this Agreement except while on assignment for Contractor.

(R. Exh. 3, p. 3 (bolded text in original)).

In her email, Estrada set forth certain additional terms that "[o]ur contracts will describe." Chief among these terms were half-day and full-day rates, 24-hour cancellation with pay, a full hour of additional pay if a case ran 1 minute beyond the half-day or full-day, travel per diems, and a provision prohibiting the de-assignment of any case unless "cancelled by EOIR or mutual agreement." (R. Exh. 3, pp. 1-2). Northcutt replied to Estrada on September 16, 2015, stating that she had forwarded Estrada's email to program management for review and would be back in touch. (R. Exh. 3, p. 1).

Estrada testified that the California group of interpreters participated in three significant negotiation sessions with SOSi, and that there was give and take on both sides during these negotiations. The half day and full day rates were a significant topic of discussion. (Tr. 660-664). Stephany Magana testified that the group agreed not to agree to any terms until they collectively agreed on a "global rate" for all interpreters. (Tr. 381). The interpreters were also concerned with the "exclusivity" clause set forth in the initially proposed ICA as some understood it to mean that they could not perform work for other agencies while under contract with SOSi. (Tr. 335-336). Ultimately, the California group of interpreters and SOSi came to an agreement on or about October 31, 2015, on a much shorter ICA, which included half-day/full-day session rates of $225/$425 for cases that did not require travel. (Tr. 216, 329; *see e.g.*, GC Exh. 4, p. 7). For cases requiring travel, interpreters and SOSi would negotiate on a case-by-case basis depending on the circumstances, e.g., length of travel days and assignment, distance from home, etc. (Tr. 1317-1318). The ICA also contained additional language making clear that as independent contractors, the interpreters could work for other agencies, and it contained the desired 24-hour

cancellation policy under which any cancellation with less than 24-hours' notice would result in full payment to the interpreter. (GC Exh. 4, p. 3, ¶ 13; GC Exh. 4, p. 8).

Although the negotiations with the California interpreters took center stage, similar negotiations were occurring throughout the country. (*See* JX 1(fff) [2015-2016 Ready-to-Work List of Interpreters, showing their negotiated rates of pay for 2015-2016]). Kathleen Morris (Illinois) testified that she negotiated with SOSi's recruiter over the terms of her ICA. (Tr. 1025). Morris proposed that SOSi pay her a flat half-day and full-day rate for work, rather than the hourly rate structure that SOSi had initially proposed. (Tr. 1026). Eventually, Morris and SOSi's recruiter agreed upon a rate of $201 for a half day of work and $320 for a full day of work. (Tr. 1025-1026). Morris understood that SOSi was engaging her as an independent contractor, not employee. (Tr. 1026, *see* GC Exh. 222). Morris also negotiated a 24-hour cancellation provision in her ICA, which enabled her to receive pay for cases that were cancelled less than 24 hours in advance of their scheduled time. (Tr. 1033-1034).

Between September 2015 and July 22, 2016, out of the approximately 849 interpreters on SOSi's 2015-2016 RTW list, some 432 of those interpreters had negotiated hourly rates with SOSi, ranging from $25.00 to $200.00 per hour. (*See* JX 1(fff)). Several of the interpreters who negotiated hourly rates additionally negotiated half-day/full-day rates as well, which ranged from $133.00 to $313.50 for a half day of work and $211.58 to $498.71 for a full day of work. (*Id.*) The remaining 417 interpreters on SOSi's 2015-2016 RTW list negotiated either half-day/full-day rates only, flat rates only, or some combination of the two. (*Id.*) The half-day/full-day rates ranged anywhere between $120.00/$220.00 and $500.00/$700.00. (*Id.*) The flat rates ranged anywhere between $175.00 and $600.00. (*Id.*) Other interpreters negotiated certain pay rates based on the particular location of an Immigration Court. For example, an Assyrian language

interpreter named Eve Abraham negotiated a specific hourly rate of $60.00 for all cases in San Antonio, Texas and a flat rate of $375.00 for all cases in Pearsall, Texas. (*Id.* at p. JX000725). These rates differed from Ms. Abraham's standard flat rate of $400.00. (*Id.*) A Nahuatl language interpreter named David Vasquez negotiated a $150.00 daily premium for detention cases. (*Id.* at p. JX000760). These variations among the structure and amount of interpreters' pay rates were the product of arms-length negotiations that occurred between each interpreter and SOSi at the time the ICAs were formed and executed.

Further, the 2015-2016 RTW list demonstrates a wide difference among pay rates for interpreting assignments requiring travel. (*See* JX 1(fff)). For instance, an American Sign Language interpreter named Tiffany Schneider negotiated a $400.00 flat rate for all travel cases, and an Ashanti language interpreter named Jonathan Baiden negotiated a travel rate of $400.00, plus travel and expenses. (*Id.* at p. JX000756, JX000728). In contrast, for Somali language interpreter Dheman Abdi and for Indonesian language interpreter Alphina Zapantis, the 2015-2016 RTW states that travel was negotiable. (*Id.* at p. JX000725, JX000762). And yet, other interpreters negotiated travel rates based on geographic location. An Indonesian language interpreter named Indawati Setiabudi negotiated the following rates for travel to the west coast, east coast, or middle of the country, respectively: $525.00, $450.00, and $475.00. (*Id.* at p. JX000725). Besides pay rates, interpreters also negotiated other terms of their ICAs during this period. This is reflected on the 2015-2016 RTW list as well. For example, a Quiche language interpreter named Modesto Boton Rodriguez negotiated a 48-hour cancellation notice. (*Id.* at p. JX000730). And, a Spanish language interpreter named Danitza Elias-Prybyla negotiated a $75.00 cancellation fee. (*Id.* at p. JX000736).

F. ICA 1.0

On October 31, 2015, an agreement was reached with the southern California interpreters, which would become the template for the vast majority of ICAs throughout the country, including the alleged discriminatees. (Tr. 599-601, 669-670; GC Exhs. 4, 43, 80, 96, 113, 139, 162, 190, 222). This version was only 4 pages long, with some additional exhibits. (JX 1(j)). Section 1 of the ICA, entitled "Scope of Work," stated that SOSi "hereby retains the Contractor to provide language interpretation and translation services in connection with SOSi's prime contract" with DOJ EOIR and that "Contractor shall only be authorized to work under this Agreement pursuant to Interpretation Service Requirements ('ISR's')" issued by SOSi. (*Id.* at ¶ 1).

Section 2 defined the "Period And Place of Performance." The term of the ICA would run from October 26, 2015[14] to August 31, 2016. SOSi included August 31, 2016 as the end date of all of the initial ICAs to coincide with the end of its base year of performance under the EOIR Contract, after which the government retained the option to extend or not extend the EOIR Contract beyond the initial base year (i.e., September 1, 2015 to August 31, 2016). (*See* JX 1(a) ¶ B.1.(b), JX 1(f) ¶ B.1.(b)). Performance would occur at "Government sites located throughout the U.S. and its territories." (*Id.* at ¶ 2). These sites were the EOIR Immigration Courts.

Section 3 (Termination) permitted SOSi "to terminate this Agreement at any time for its convenience upon written notification to the Contractor, with such advance notice as the Company deems appropriate under the circumstances. . . . The Contractor shall not be permitted to terminate this Agreement or discontinue the services provided in connection with an active

[14] This date was not the same in all ICAs, as interpreters were signing up at different times.

ISR or TSR issued hereunder except with the Company's advance written consent, which shall not be unreasonably withheld, and with such advance notice as the Company deems appropriate under the circumstances."[15] (*Id.* at ¶ 3). The record does not reflect that SOSi terminated any contracts during the initial contract year.

Section 4 of the ICA (Travel) specified that local travel expenses would not be reimbursed and that "where travel is required, reimbursement of travel costs will be negotiated on a case-by-case basis." (*Id.* at ¶ 4). The record reflects extensive negotiations between the interpreters and their regional coordinators regarding travel rates. (R Exhs. 27-35, GC Exh. 209, 214, 239, Tr. 1415, 1451, 1334).

Section 5 (Independent Contractor) provided:

> The Contractor is not an employee of the Company. The manner in which the Contractor's language interpretation and translation services are rendered shall be within the Contractor's sole control and discretion, provided the Work is performed in accordance with the SOW.
>
> The Contractor shall be responsible for all taxes arising from compensation and other amounts paid under this Agreement. Neither federal, nor state nor local income tax, nor payroll tax of any kind (including, but not limited to Social Security, Medicare and any state unemployment taxes), shall be withheld or paid by the Company on behalf of the Contractor. The Contractor will not be eligible for, and shall not participate in, any employee benefit plan of the Company. No unemployment, disability or U.S. domestic workers' compensation insurance shall be obtained by the Company to Cover the Contractor.

(JX 1(j) ¶ 5). Consistent with this characterization, interpreters registered and maintained business licenses in their cities of residence, created business cards advertising the fact that they

[15] The EOIR Contract similarly allows the DOJ to terminate the EOIR Contract at any time for its convenience upon written notice to SOSi. (JX 1(a) ¶ I.1, p. JX000056; JX 1(f) ¶ I.1, p. JX000268 (citing FAR Part 52.249-2 which provides that "The Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest.")).

maintained independent interpreting businesses, maintained LinkedIn profiles describing themselves as freelance interpreters, advertised their interpreting services and experience on self-created websites, and filed their tax returns as sole proprietors, using Internal Revenue Service's ("IRS") Schedule C Form 1040s. (R. Exh. 1, pp. 8-9 [Bejar 2015 IRS Form 1040]; R. Exh. 2, pp. 5-6 [Bejar 2016 IRS Form 1040]; R. Exh. 4, pp. 5-12 [Portillo 2015 & 2016 IRS Forms 1040]; R. Exh. 5 [Magana 2016 IRS Form 1040]; R. Exh. 6 [Magana 2015 IRS Form 1040]; R. Exh. 8, pp. 7-8 [Espinosa 2016 IRS Form 1040]; R. Exh. 10 [Espinosa LinkedIn Profile]; R. Exh. 13 [Rosas Website] R. Exh. 39 [Magana 2015 IRS Form 1040]; R. Exh. 40 [Magana City of Los Angeles Tax Registration Certificate]; GC Exh. 296, p. 5 [Magana Resume]; *see also* Tr. 226-227, 374-375, 434-435). Further, on these IRS forms, interpreters deducted thousands of dollars of business-related expenses, including car expenses, miscellaneous office expenses, taxes and licenses, meals and travel expenses, continuing education classes, and cell phone and internet services, among other expenses, which is consistent with their independent contractor status. (R. Exh. 1, pp. 8-9; R. Exh. 2, pp. 5-6; R. Exh. 5; R. Exh. 6; R. Exh. 8, pp. 7-8; R. Exh. 39).

Section 6 (Relationship of Parties) states that the ICA does not create a partnership or employment relationship "that would impose liability upon one party for the act or failure to act of the other party." (JX 1(j) ¶ 6). Further, "Contractor shall not use the service of any other person, entity or organization in the performance of the Contractor's duties under this Agreement." (*Id.*) In practice, however, interpreters were permitted to swap assignments or transfer assignments to other qualified interpreters, provided they notified their Regional Coordinator and obtained approval. (R. Exhs. 22, 26; GC Exhs. 10, 12, 14; Tr. 399-400 (wherein the parties stipulated that interpreters could swap cases with a regional coordinator's approval)). Such approval was routinely granted. (*See* Tr. 1439-1440).

Section 7 (Security; Confidentiality) provided:

> The Work to be performed under this Agreement will involve access to unclassified information. The Contractor will be subject to a Public Trust Investigation.
>
> Duplication or disclosure of the data and other information to which the Contractor may have access as a result of this Agreement is prohibited. This includes, without limitation, any information which is identified by SOSi at the time of disclosure as being proprietary or confidential or that due to its character and nature, or the circumstances of its disclosure, a reasonable person would recognize as being confidential or competitively sensitive. "Data" in this context includes any information about the cases or investigations the Contractor is working on, including the names and subject matters of the cases or investigations. The Contractor agrees not to disclose or divulge any such data, any interpretations and/or translations thereof, or data derivative therefrom, to unauthorized parties in contravention of these provisions.

(JX 1(j) ¶ 7).

Section 8 (Limitation of Liability) states that SOSi's liability to Contractor will not "exceed the value of the Work already performed and accepted by the Customer" and "neither party to this Agreement shall be liable to the other for indirect, special, incidental, or punitive damages in connection with, performance of any obligations under this Agreement, regardless of whether the parties have been advised of the possibility of such damages." (JX 1(j) ¶ 8). There is no evidence in the record of any claims by either party for such damages.

Section 9 (Compliance With Laws; Indemnification) provides that "Contractor must comply with all relevant U.S. and foreign, federal, state, and local laws and regulations, including but not limited to the Drug-Free Workplace Regulations and applicable anti-corruption requirements." (JX 1(j) ¶ 9). Further, "Contractor shall indemnify, defend and hold harmless the Company from and against any and all claims, demands, lawsuits, liability, costs and fees (including attorneys' fees) threatened or incurred as a result of Contractor's breach of or failure

to perform his/her obligations under this Agreement." (*Id.*) The record contains no evidence of SOSi ever seeking indemnification from an interpreter.

Section 10 (Compliance With Company And Customer Policies) states:

> The Contractor must comply with all Company and Customer policies and procedures described in the SOW, including the EOIR Court Interpreter Handbook and the SOSi Code of Business Ethics and Conduct. In rendering interpretation or translation services under this Agreement, the Contractor shall conform to high professional standards of work and business ethics.

(JX 1(j) ¶ 10). The only specific SOSi policy contained in the record is the Code of Business Ethics and Conduct, which was attached to ICA version 1.0.[16] All other policies emanated from the EOIR.

Section 11 (Facilities; Property) provides that "[w]hile at any SOSi or U.S. Government facility, or connected to any SOSi or U.S. Government network, the Contractor shall observe and follow SOSi or U.S. Government site rules, policies, and standards, including, without limitation, those rules, policies, and standards relating to security of and access to the facility and its telephone systems, electronic mail systems, and computer systems." (JX 1(j) ¶ 11). There is no evidence that any interpreter ever visited a SOSi facility, but they did have limited access to SOSi's file sharing site called Egnyte.

Section 12 (Publicity) provides:

> No news release or other public announcement shall be made about this Agreement without the prior written consent of SOSi. Contractor shall direct to SOSi (without further response) any media inquiries concerning SOSi, this Agreement or the Contractor's Work for or engagement by SOSi.

(JX 1(j) ¶ 12).

[16] The Code of Business Ethics and Conduct was removed in subsequent versions of the ICA as SOSi determined that its use was only required for large subcontractors whose subcontracts were valued well in excess of each interpreter's ICA. (Tr. 1303-1306).

Section 13 (Restrictions) provides that "Contractor shall not accept work under the Prime Contract from any company other than SOSi unless previously approved in writing by SOSi, but clarified (as requested by interpreters) that this "restriction relates only to work to be performed by Contractor under the Prime Contract with DOJ EOIR," and that nothing in the ICA would "preclude Contractor from performing work under any other DOJ program or under any federal, state or local agency contract." (*Id.*, Tr. 1369-1370; *see* Tr. 1369 (noting that the interpreters "wanted to be independent contractors because just about all of them had other jobs. So they didn't want to be tied strictly to the contract. They wanted the ability to work at other places" [Claudia Thornton]).

Section 14 (Debarment) is a representation by Contractor that "he/she is not presently debarred, suspended or proposed for debarment by the U.S. Government." (JX 1(j) ¶ 14). Section 15 (Order Of Precedence) provides that any ambiguities, inconsistencies, or conflicts in the ICA shall be resolved by giving precedence first to the ISR or TSR, next to the terms and conditions of the ICA, and last to any attachments or exhibits to the ICA. (JX 1(j) ¶ 15). Section 16 (Governing Law; Disputes) provides that any disputes regarding the ICA shall be resolved in the federal courts of Virginia and under the laws of the Commonwealth of Virginia and federal common law. (JX 1(j) ¶ 16). Further, no action may be brought "more than two (2) years following the date the cause of action arose or following the date upon which the alleging party knew or reasonably should have discovered its cause of action, whichever occurs later." (*Id.*) Section 17 (Severability) provides that any unlawful or unenforceable provision should be severed so as not to affect the validity of all remaining provisions. (JX 1(j) ¶ 17). Further, "[f]ailure by either party at any time to require strict performance by the other party or to claim a

breach of any provision of this Agreement will not be construed as a waiver of any subsequent breach or default." (*Id.*)

Section 18 (Assignment; Third-Party Rights) states that the Contractor "may not assign the Contractor's rights or obligations under this Agreement" and that there are no "third party beneficiaries." (JX 1(j) ¶ 18). Section 19 (No Conflict With Other Agreements) is a representation by the Contractor that "the terms of the Agreement are not inconsistent with any other contractual or legal obligations the Contractor may have." (JX 1(j) ¶ 19). Section 20 (Survival Provisions) provides that all provisions of the ICA that "must survive its termination to be given their intended effect shall so survive." (JX 1(j) ¶ 20). These provisions include but are not limited to Sections 7, 8, 9, 12, 13, and 15. (*Id.*) Section 21 (Notices) identifies Jessica Hatchette, Sr. Subcontracts Manager, as the person to whom notices to SOSi shall be delivered. (JX 1(j) ¶ 21). Finally, Section 22 (Entire Agreement) provides that the ICA and all exhibits constitute the "entire agreement", supersede any prior agreements, and "may be changed only by a written agreement signed by both parties." (JX 1(j) ¶ 22).

G. Transition Issues

When SOSi first acquired the EOIR Contract, there was a transition period that extended into February 2016 during which SOSi encountered significant difficulties that delayed full operational performance. Due to difficulties that prevented timely contract transition, SOSi did not begin performing the contract until December 1, 2015. (Tr. 1044, 1374).

Specifically, SOSi experienced challenges with recruiting interpreters previously used by Lionbridge,[17] program infrastructure, and also with engaging new interpreters to fill all of the

[17] At the time SOSi was awarded the EOIR Contract, Lionbridge did not provide SOSi with a roster of then-current interpreters who had been under contract with Lionbridge at the Immigration Courts. (*See* GC Exh. 78).

hearings at the Immigration Courts. (*Id.*, Tr. 1377). Jessica Hatchette, Charles O'Brien, and Claudia Thornton testified that initially SOSi attempted to contract with larger corporate interpretation companies, including Metropolitan Language or "Metlang," Leidos, and Language Line Associates to assist in engaging additional interpreters to fill all hearings in southern California and elsewhere during this difficult period. (Tr. 768, 1296-1297, 1371-1372, *see* R. Exh. 20). SOSi later abandoned this plan after interpreters refused to do business with Metlang or other subcontractors. (*Id.*)

Other actions by the EOIR also hindered SOSi's actions during the transition period. Pursuant to the initial EOIR Contract, the EOIR was required to perform a "Public Trust Investigation" security screening at no expense to SOSi. (JX 1(a) ¶ H.3.1(a)). SOSi's performance could not begin under the EOIR Contract until a "sufficient number" of personnel have been cleared. (*Id*.) Despite this mandate, problems with EOIR's screening process during contract transition created delays in approving interpreters to work under the EOIR Contract. (*See* Tr. 1079).

Claudia Thornton further testified about the other business and administrative challenges that SOSi faced during this transitional period, and more generally during its first year under the EOIR Contract. (Tr. 1318-1320). SOSi tried to develop a unique software program through a company named BigWord to assign cases to interpreters, but the program developed by BigWord was insufficient to meet SOSi's needs in scheduling case assignments adequately. (Tr. 1376). Therefore, use of the program was abandoned in favor of a simpler Excel-based software until SOSi could develop its own scheduling software that met its needs. (Tr. 1375-1376). As a result, during the initial months, SOSi experienced considerable difficulties in scheduling and assigning cases to interpreters. (Tr. 1376-1377). Multiple interpreters were sometimes booked for the same

assignment and other interpreters experienced delays in receiving their payments. (*Id.*, Tr. 1377-1378, GC Exh. 19). Thornton and SOSi understood interpreters' concerns regarding the delays in payment and had no issue or concern with the fact that interpreters were complaining to the public about this issue. (Tr. 1378).

Upon learning of these issues, SOSi worked to remedy them as soon as it could. (*See* Tr. 1377-1378, GC Exh. 19). And, by January or early February 2016, these infrastructure issues were largely remedied. (Tr. 868, 1378). To continue to monitor payment issues, however, SOSi established a dedicated email address—payment.issues@sosi.com—to help interpreters experiencing additional problems with receiving payment for their services. (GC Exhs. 20, 219). There is no evidence of any significant pay issues after February 2016.

H. Actual Relationship Between SOSi And Interpreters

The interpreters themselves have minimal interaction with SOSi's employees. (Tr. 153-154). (Tr. 1052; Tr. 392-393 (wherein the parties stipulate that after January 2016, the assignment process was that the interpreter would make his or her availability known to a regional coordinator; the regional coordinator would offer the case to be confirmed or rejected by the interpreter; and then the interpreter could either accept or reject the case)). (Tr. 153, 392-393, 1428-1429, 1456-1457, 1464). The interpreters typically have never met a regional coordinator in-person. (Tr. 1456). Interpreters do not have set schedules, but instead will send their availability to their regional coordinators generally one month in advance. The coordinators offer assignments to interpreters based on that availability and the number of work orders placed by EOIR. (*Id.*; *see e.g.*, GC Exhs. 7, 12). If the interpreter declines the assignment, the regional coordinator will offer it to another interpreter, who is free to accept or decline. (*Id.*, Tr. 1429-1430). If the interpreter accepts the assignment, the regional coordinator sends an email

confirmation with the details of the assignment. (*Id.*, R. Exh. 35). If travel is involved, the interpreter and the coordinator will negotiate a rate for that travel, unless the interpreter has previously set his or her travel rate with SOSi. (R. Exhs. 27-35, Tr. 1415, 1451).

Interpreters also are free to communicate their preferences regarding work assignments, judges, and schedules to regional coordinators and these preferences are accommodated to the extent feasible and practical. (GC Exh. 56; *see* Tr. 1147). Maria Portillo, for instance, testified that she advised her regional coordinator that she would not accept detainee cases, cases at the Immigration Court in Adelanto, California, or cases in Arizona or New York that would require Portillo to travel. (Tr. 344). Portillo additionally did not want work with certain immigration judges. (GC Exh. 56, Tr. 1444). To the extent possible, SOSi attempted to accommodate these preferences. (Tr. 1443-1444).

When an interpreter accepts an assignment, the interpreter agrees to cover that case, but to the extent that he or she decides to later cancel the assignment after acceptance, SOSi has no recourse or control over the interpreter's decision. (Tr. 1435). On this point, Regional coordinator Siddiqi testified:

> Q: In terms of interpreters who accept cases or confirm cases, are there occasions when after confirming a case, interpreters will then drop the case or decline it?
>
> A: Yeah, that happens quite a lot, yeah.
>
> . . .
>
> Q: What reasons have they given for that?
>
> A: So they give different reasons, due to a family emergency, due to a person[al] reason or because I accepted another assignment, or because I have surgery coming up, or sometimes they [don't] even just give us a reason. They drop the case.
>
> Q: And do you recall any specific examples of anyone who dropped one because they had taken a more – a better paying case?

A: Yeah, absolutely. One example I can think of, and I distinctly remember this, is Irma Rosas was one of the interpreters in California who had confirmed a week's cases that she later dropped only with, you know, just 1 or 2 days before the hearing date, and her reason was, well, I go[t] another assignment, travel assignment from another agency, and I'm going to basically be interpreting in a conference for the entire week, and they'll pay me a flat rate of $600 per day as opposed to $425 if I take, you know, if I cover the SOSi cases. So – and her reason was, you know, it's not profitable for me, and she said I'm going to be honest with you, that's why I'm dropping these cases.

Q: When someone drops a case like that, what do you have to at that point?

A: So I can't say anything to the interpreter because they have the right. They can drop a case any time they want, and my job is just to reassign the case, to find a replacement for the case . . .

(Tr. 1434-1436). Thus, when an interpreter cancels an assignment after acceptance, the regional coordinator must attempt to find a replacement interpreter to cover the hearing or else SOSi may be assessed a "no-show" fee by the EOIR. (JX 1(a) ¶ F.7.2, JX 1(f) ¶ F.7.2, Tr. 1435-1436).

Interpreters may swap or "reassign" cases among one another with SOSi's approval, and sometimes did so without informing SOSi at all without any consequence. (GC Exh. 10, GC Exh. 12, GC Exh. 14, GC Exh. 60, R. Exh. 22, 26, Tr. 183, 1439-1441). Regional Coordinator Siddiqi testified that there were no circumstances under which he could recall withholding approval of a request to give a case to another interpreter. (Tr. 1440). SOSi requests that interpreters notify their coordinator before transferring a case to another interpreter to ensure that the name of the interpreter assigned to the hearing in the EOIR's computer system matches the name of the interpreter submitting the COI for payment. (Tr. 1440-1442, 1449-1450). Where that does not occur, problems may arise when the EOIR attempts to reconcile the name of the interpreter assigned to the hearing and the name of the interpreter submitting the COI for payment. (*Id.*, *see* R. Exh. 25).

Moreover, most interpreters performed ongoing work for their other interpreting clients while simultaneously under contract with SOSi. (Tr. 44, 375, 574, 608, 888, 968; *see* GC Exh. 296, p. 22 [Resume of Stephany Magana], p. 30 [Resume of Jo Ann Gutierrez Bejar]; R. Exh. 36 [Resume of Rosario Espinosa]). For example, Jo Ann Gutierrez Bejar testified that she regularly accepted interpretation work from other agencies and companies, including from LRA, Tony Barrier, De La Torre Interpreting, and One Call. (Tr. 44). Interpreter Rosario Espinosa performed work for other interpreting agencies as well, including ProCare, Access On Time, and Fluent/Pacific Interpreters. (Tr. 562, R. Exh. 8).

Although interpreters must comply with certain EOIR policies and act with high professional standards of work and business ethics—as required under the EOIR Contract—SOSi does not exercise any control over the performance of their work, or establish or control the rules that interpreters must follow while in the Immigration Court. (JX 1(i) ¶ 16, JX 1(j) ¶ 5, JX 1(k) ¶ 3, JX 1(l) ¶ 3, JX 1(m) ¶ 3, JX 1(eee) ¶ 3, JX 1(iii) ¶ 3; JX 1(a) ¶¶ C.3.8, C.3.11; JX 1(f) ¶¶ C.3.8, C.3.11). Indeed, the record is clear that to the extent that there are rules that interpreters must abide by, those rules come directly from the EOIR or Immigration Courts, not SOSi. This fact was made clear to interpreters in SOSi's email correspondence to them about the rules. For instance, in an April 13, 2016 email from Claudia Thornton to the interpreters, she specifically reports complaints reported from LSU about the EOIR's dress code: "Over the past week or so, we've received complaints from DOJ at least 5 times about interpreters showing up in court in casual clothing . . . Court personnel are monitoring this closely due to the recent spike in issues and will begin sending interpreters home who are not dressed appropriately." (GC Exh. 144; *see also* R. Exh. 38 (detailing specific dress code for the Immigration Court located in Florence, Arizona.)).

In a later email, dated May 25, 2016, from Thornton to the interpreters, she reports another complaint that SOSi received from LSU, namely about interpreters' failing to wear their identification badges:

> *It seems that some of the interpreters aren't bringing badges with them to hearings.* EOIR understands that many of you have been working the courts long enough that security personnel know you and you can get inside without the badges. *Our contract with EOIR, however, requires that each of you wear the badge while in court.*

(R. Exh. 21 (emphasis added)). SOSi included similar reminders of the EOIR's identification badge requirement at the bottom of email correspondence to interpreters confirming case assignments:

> *Reminder: Please remember to always wear your SOSi ID badge when in court. This is a contract requirement and the purpose is not just to help you get through building security, but also to identify you as an interpreter and avoid potential conflicts of interest.

(GC Exh. 61; *see also* GC Exhs. 15-16 (EOIR directives to interpreters on charging and storing equipment); R. Exh. 38 (email from Wiggen directing SOSi to "*[p]lease remind all contract interpreters* appearing for EOIR assignments *that they must dress in a manner that is expected for judicial settings.*") (emphasis added); Tr. 1186, 1379)).

In addition, there are no agents or representatives of SOSi on-site at the various Immigration Courts that interpreters have to report to upon arrival or departure. (Tr. 970). The only individual who has any connection to SOSi and who sometimes is present at the immigration courts is the "liaison." (Tr. 1172-1173). But the liaison is also an interpreter who provides interpreting services under an ICA in the same fashion as other interpreters. (*Id.*) The primary function of the liaisons is to perform an on-site orientation of the courthouse layout for new interpreters, i.e., acquaint them with the check-in window and the various courtrooms, the courthouse security procedures, and the courtroom equipment. (Tr. 71, 73, 135-136, 1172-1173,

1217-1218, 1323-1324). On occasion, a liaison may coordinate situations where one interpreter is running late and a switch can be made so that all cases are covered as well. (Tr. 196).

With regard to the interpreters' actual performance of work, SOSi does not dictate or control which mode of interpretation interpreters use in the courtroom. (Tr. 150; *see also* JX 1(hhh), Full and Complete Memo, p. JX000985). During the court proceedings, the mode of interpretation used—simultaneous or consecutive[18]—is left to either the discretion of the presiding judge or interpreter, depending on the circumstances. (Tr. 124-126, 438, 440-441, 577; JX 1(hhh), Full and Complete Memo, p. JX000985). On this point, Magana testified:

> Q: Okay, and as an interpreter, do you have the authority, on your own, to determine what [interpreting] method to use?
>
> A: Yes.
>
> . . .
>
> Q: Okay. And no one within the court tells you what method you're supposed to use at any point in time?
>
> A: Well, it depends. Some judges, particularly in an immigration court, have a certain way of doing things, and some like it one way or the other.
>
> . . .
>
> Q: But if you – to the extent that you're asked to do something, those instructions come from the judge?
>
> A: Yes.
>
> . . .
>
> Q: I would ask you that question, Ms. Magana, the way I've just phrased that. *In other words, that you have the ability and authority to determine the mode of interpretation unless the judge specifies otherwise, and that SOSi does not give you any direction on how to do that; is that an accurate statement?*

[18] Simultaneous interpretation is defined as the process of interpreting into the common language at the same time as the speaker's native language is being delivered. (GC Exh. 5, OCIJ Interpreter Handbook, p. 1; Tr. 909). Consecutive interpretation is defined as the process of interpreting after the speaker completes one or more ideas in the speaker's native language and pauses while the interpreter transmits that information in English. (*Id.*)

A: *That's an accurate – accurate statement*.

(Tr. 438-441 (emphasis added)). Bejar testified similarly, corroborating Magana's testimony as to the lack of control exercised by SOSi while interpreters render their services at the Immigration Courts:

> Q: But in the course of working through Lionbridge and SOSi, no one from either of those agencies ever told you how you were to do your interpreter job, correct?
>
> A: In terms of what exactly?
>
> Q: The actual performance of interpretation?
>
> A: No.

(Tr. 151-152).

Moreover, under certain circumstances, the immigration proceedings require a particular style of interpreting known in the profession as "relay interpreting." (Tr. 105, 276, 362-363, 1389). Relay interpreting is the practice of interpreting from one language to another through a third language, with the use of two separate interpreters. (*Id.*) In the Immigration Courts, it is most typically utilized to interpret certain indigenous languages that are spoken by limited populations in Latin America, such as the Mam language.[19] (*See* Tr. 1443). For example, when an alien in a proceeding speaks Mam only and is to be interpreted into English where no Mam-to-English interpreter is available, the interpretation into English will be *relayed* through two interpreters: the first interpreter will convert the speech from Mam to Spanish, and the second

[19] Mam is a Mayan language spoken by over 500,000 individuals in Guatemala and the need for interpreters in Immigration Courts who are proficient in Mam has spiked in recent years. (Cindy Carcamo, "Ancient Mayan languages are creating problems for today's immigration courts," Los Angeles Times, August 9, 2016, *available at*, http://www.latimes.com/local/california/la-me-mayan-indigenous-languages-20160725-snap-story.html (last accessed January 5, 2018)).

interpreter will then interpret the speech from Spanish into English, and vice versa. (*Id.*, Tr. 276). Thus, the capabilities of an interpreter, not SOSi, dictate whether relay interpreting is required.

Besides mode or style of interpretation, judges may also dictate when and whether interpreters are permitted to take rest, bathroom or lunch breaks. (Tr. 365-369 (wherein the parties stipulated that interpreters cannot take bathroom breaks or lunch breaks without permission from the judge)). SOSi has no ability to control or decide how judges operate their courtrooms. (Tr. 187, 328, 581).

In addition, the setting in which interpreters render their services can be difficult and stressful, caused mostly by the fact that the outcome of the proceedings may result in the removal or exclusion of the alien from the United States temporarily or permanently. (GC Exh. 5, OCIJ Interpreter Handbook, p. 13; Tr. 206-207). As such, interpreters often work under intense and anxious conditions, dealing with aliens faced with the real possibility of being removed or excluded from returning to the United States. (*Id.*) And for certain other aliens, such as ones detained by Immigration and Naturalization Service, additional stress can be caused because the alien may have recently been released from prison or be in a detention facility as his/her case progresses through the Immigration Court, which can, in turn, affect the stress level of the proceeding itself. (*Id.*)

With regard to equipment, interpreters are required by the EOIR to use EOIR's Digital Audio Recording ("DAR") system, which, depending on the particular mode of interpreting utilized, is comprised of either table-mounted microphones or a combination of wireless transmitters and receivers. (JX 1(hhh), Standards Memo, pp. JX000971, JX000979). The DAR system and its equipment are not owned or maintained by SOSi; instead, court administrators are supposed to secure the interpreter equipment at the end of each hearing, inventory the equipment

each business night, and also ensure that the equipment is properly charged for daily use. (*Id.* at p. JX000980). SOSi does not provide the interpreters with any other equipment or bilingual dictionaries to assist them in performing interpretation services and their interpretation services are performed either over the phone or in the immigration courthouses themselves.

With regard to payment, when an interpreter completes a hearing, the presiding judge signs the COI form and the interpreter then submits the COI with a confirming signature from the court to SOSi to receive payment for that assignment. (Tr. 1053). SOSi processes COI payment on a net-30 basis, providing payment to interpreters at the rate agreed to in the ICA or at the rate negotiated between SOSi's regional coordinator and the interpreter within 30 days of receiving the COI submission. (GC Exh. 18, Tr. 513). SOSi's preferred method of providing compensation is through direct deposit to an individual's bank account, and for that reason, SOSi requests each interpreter complete an Independent Contractor Direct Deposit form, providing banking information for the account in which deposits will be made. (Tr. 348, *see also* GC Exh. 5, Direct Deposit Form).

I. Renewal Process for ICA 1.0

During the first year of the EOIR contract, SOSi was losing in the neighborhood of $2,000,000 per month, primarily as a result of unsustainably high pay rates for contract interpreters, excessive travel costs, and high administrative costs in managing the program and dealing with interpreters. (Tr. 1246-1247, 1315-1316, 1318, 1324-1325). These losses could not be sustained indefinitely, and as the initial ICAs were scheduled to terminate on August 31, 2016, SOSi sought to negotiate new rates for interpreters to reduce its ongoing monetary losses and to bring interpreters' rates of pay into accord with more standard market rates for courtroom interpreters across the county. (Tr. 1246-1247, 1307). Because SOSi was dealing with hundreds

of interpreters throughout the nation and because different languages and geographic languages command different rates, SOSi and its Senior Subcontracts Manager, Jessica Hatchette, decided to address the renewals in different stages and by dividing the interpreters into three groups: (1) California Spanish interpreters, (2) California non-Spanish and SCSI interpreters, and (3) all other interpreters in the United States. (Tr. 1244, 1253-1254). Included with all of these renewals was SOSi's "Annual Compliance Representations and Certifications," which are provisions required by the FAR and which had previously been inadvertently omitted from the package of documents provided by SOSi to interpreters. (GC Exh. 180, Tr. 1233-1234, 1311-1312).

With respect to the California Spanish group of interpreters, on or about August 19, 2016, SOSi issued proposed 30-day extensions to this group so as to allow time to solicit requests for proposals/quotes from the interpreters. (Tr. 1253-1254, 1326). On September 12, 2016, SOSi sent out its RFQs. (JX 1(oo)). These RFQs requested that the interpreters submit bids based on hourly rates not to exceed $35 for Spanish, $44 for common languages, and $50 for uncommon languages. (*Id.*) Although these rates were described as "not to exceed" and "maximums," interpreters successfully negotiated for rates above these stated maximum amounts. (Tr. 1323-1324; *see* JX 1(ggg), Parts B-D [2017-2018 RTW Interpreter List]). If the interpreter and SOSi could not agree on an hourly rate, the interpreter was offered a modification to his or her existing ICA in lieu of signing a renewed ICA with SOSi's preferred hourly rate structure. (Tr. 1267-1268, 1331-1332; *see* JX 1(ggg), Parts B-D [2017-2018 RTW Interpreter List]).

With respect to the California non-Spanish and SCSI interpreters, SOSi sent a series of 45-day extensions, the most recent being an extension to interpreters whose rates were already determined to be fair and reasonable (within a percentage of the current standard rates). (Tr. 1256-1257, 1326, *see* JX 1(v), (x), (y)). This extension expired on August 31, 2017. (*Id.*) For

those interpreters with non-standard rates, or rates that were not considered to be fair and reasonable, SOSi sent an extension which expired June 15, 2017. (JX 1(z)). On or about April 8, 2017, SOSi also sent RFQ's to those interpreters with non-standard rates, which were due back on April 15, 2017. (JX 1(ll). These RFQs requested bids based on hourly rates with the same maximum rate structure permitted in the RFQs submitted to the California Spanish group. As with the California Spanish group of interpreters, SOSi and the interpreters would thereafter negotiate hourly rates from the rate scale proposed by SOSi and enter into a new ICA. (*See* Tr. 1324; JX 1(ggg), Parts B-D [2017-2018 RTW Interpreter List]). If an interpreter and SOSi could not agree on an hourly rate, the interpreter was offered a modification to his or her existing ICA in lieu of signing a renewed ICA with SOSi's preferred hourly rate structure. (Tr. 1331-1332; *see* JX 1(ggg), Parts B-D [2017-2018 RTW Interpreter List]).

Finally, with respect to all of the United States, excluding California, this group also received a series of extensions, albeit of different lengths than the two other groups. For those interpreters whose rates were determined to be fair and reasonable, SOSi sent an extension which expired on August 31, 2017. (JX 1 (v), (x), (y)). Consistent with the California non-Spanish and SCSI interpreters, SOSi sent RFQs and 60-day extensions to those interpreters with non-standard rates or rates that were not considered to be fair and reasonable. (JX 1(p), Tr. 1326). SOSi sent out RFQs for this group that contained the same maximum hourly rates of $35, $44, and $50. (JX 1(kk)). These quotes were due back on May 5, 2017. (*Id.*) SOSi and the interpreters would thereafter negotiate hourly rates from the rate scale proposed by SOSi and enter into a new ICA. (Tr. 1324; *see* JX 1(ggg), Parts B-D [2017-2018 RTW Interpreter List]). Like interpreters in other groups, if an interpreter and SOSi could not agree on an hourly rate, the interpreter was offered a modification to his or her existing ICA in lieu of signing a renewed ICA with SOSi's

preferred hourly rate structure. (Tr. 1331-1332; *see* JX 1(ggg), Parts B-D [2017-2018 RTW Interpreter List]).

Despite the "maximum" rates stated by SOSi in the RFQ, the record reflects that considerable negotiations occurred between SOSi and the individual interpreters. (*See* Tr. 1324-1325, JX 1(ggg), Parts B-D [2017-2018 RTW Interpreter List]). Numerous interpreters refused to accept these rates and continued thereafter to work for SOSi on multiple contract extensions of their initial ICAs, including the half day and full day rates previously negotiated. (See e.g., Tr. 911-912, 931). Other interpreters agreed to hourly rates, but negotiated rates higher than the "maximum," as well as higher guarantees. (Tr. 1324). Joint Exhibit 1(ggg) is SOSi's current "Ready to Work" list, which lists all of the current interpreters under contract with SOSi. (Tr. 1141). It reveals a notable difference among interpreters' rates of pay that is the product of individual negotiation on the part of interpreters. (*See* JX 1(ggg), Tr. 1477-1479).

Moreover, from July 22, 2016 to the present, the negotiations between the interpreters and SOSi over pay rates and terms of the ICAs continued. The product of these negotiations, which occurred as the interpreters renewed their ICAs with SOSi beginning in about August 2016, is reflected on the current 2017-2018 RTW list (reflecting rates negotiated after July 2016). (JX 1(ggg)). Out of the approximately 1351 interpreters on SOSi's 2017-2018 RTW list, some 904 of those interpreters negotiated hourly rates with SOSi for this period, ranging from $30.00 to $165.00 per hour. (*See* JX 1(ggg) at Part C). The remaining 447 interpreters negotiated either half-day/full-day rates, full day rates only, flat travel rates, weekly rates, monthly rates, or some combination thereof. (*Id.*) The half-day/full-day rates ranged anywhere between $100.00/$175.00 and $350.00/$700.00. (*Id.* at Part B). As just one example, a Farsi, Afghani, and Dari language interpreter named Mommandi Aisha negotiated a half-day rate of $152, a full-

day rate of $241.80, a weekly rate of $1170.00, a monthly rate of $4750.20, and a $0.30 per word for document translation. (*Id.* at Part B, p. 0054). Flat travel rates ranged anywhere between $225 and $600. (*See* JX 1(ggg) at Part B). For interpreters who did not negotiate flat travel pay rates, their travel rates were based on an agreed-upon formula using their standard hourly rates, plus any agreed upon travel stipend, which could range between $35.00 and $100.00. (*Id.* at Part D, Tr. 1137-1138). Other examples of the variations among interpreters' rates and other terms appear throughout the 2017-2018 RTW list. (*See* JX 1(ggg)). The variances among these and other interpreters' rates on Joint Exhibit 1(ggg) are the product of each interpreter's negotiation with SOSi for their pay rates. (Tr. 1477-1478).

J. Alleged Concerted Activities

During the first nine months of 2016, California and Chicago-based interpreters (including the alleged discriminatees here) raised various work-related issues and concerns to SOSi, Immigration Court personnel, the print and online press, and members of the Interpreters Guild of America Union. (GC Exhs. 26, 28, 29, 30, 32, 34, 36, 37, 38, 83, 108, 111, 112, 126, 131, 135, 136, 137, 152, 191, 223, 225, Tr. 589-601, 999-1002). Interpreters also discussed these concerns among themselves, often using email or the mobile messaging application called WhatsApp to communicate and exchange text messages or photographs, and in August 2016, held public demonstrations against the EOIR and SOSi in Los Angeles. (*Id.*; Tr. 111, 294, 416, 646, 757-758, 832, 1459-1460).

Throughout this period, there were four primary areas of concern raised by the interpreters, namely, (1) that SOSi remedy the delays or errors in payment and double-booking of assignments that interpreters experienced during the transition period; (2) that SOSi suspend and disqualify a fellow interpreter named Maria Elena Walker for her alleged misbehavior and

mistreatment of other interpreters; (3) that SOSi renounce the Southern California School of Interpretation, in favor of establishing an "in-house" department to recruit, educate, engage, and evaluate contract interpreters, which would be comprised of senior or experienced interpreters already under contract with SOSi; and (4) that interpreters resist SOSi's efforts to reduce the contractual rates when the ICAs came up for renewal in August 2016. (*Id.*) Interpreters based in southern California raised the majority of these issues with SOSi. (*See id.*).

With regard to the delayed payment issue, California interpreters spoke publically about the delays they experienced in receiving payment from SOSi for their interpreting services. (Tr. 1377-1378, GC Exhs. 28-30). On February 3, 2016, California interpreters released a press release entitled "Immigration Interpreters Not Getting Paid," which publicized the delays that interpreters experienced. (GC Exh. 28). Stephany Magana is quoted in the press release, stating "'We have been told that our bank information has been lost, the system for submitting our invoices has changed several times and our rates have not been honored. The only response we have received is that they are working on it.'" (*Id.* at p. 2). Interpreters circulated this press release to various news organization and as a result, the online news website Buzzfeed published an article regarding these payment errors and delays, where Magana is quoted again. (GC Exhs. 27, 30, Tr. 89).

On February 4, 2016, Chicago-based interpreters, including Kathleen Morris, sent a "Demand Letter" to Karen Manna, Chief of the LSU and R. Steven Frate, a Contracting Officer for the Department of Justice, highlighting similar payment delays from the perspective of the Chicago interpreters. (GC Exh. 223, Tr. 999-1002). Included in this Demand Letter was an additional criticism about SOSi's use of the Southern California School of Interpretation to train and educate new interpreters for the EOIR. (*Id.*) Further, this same letter noted that Chicago

interpreters would not work with any subcontractors hired by SOSi to assist in providing interpretation services to the Immigration Courts. (*Id.* at p. 3).

In addition, Morris subsequently registered two additional complaints about work-related conditions to SOSi's then-Program Manager, Claudia Thornton. The first complaint concerned an interpreter named Herman (last name unknown), who she alleged misused the EOIR's interpreting equipment. (GC Exh. 226). The second complaint was multipart, but related to long court security lines, accessing the Immigration Courts in Chicago during the winter, and the Immigration Court's problematic placement of the video cameras used in the Chicago courtrooms, which made interpreting more difficult for the interpreters. (GC Exh. 227).

Regarding Maria Elena Walker, on January 14, 2016, the "California Colleague Interpreters," a group that included Stephany Magana, Hilda Estrada, Jo Ann Gutierrez Bejar, and others, submitted a letter to SOSi, denouncing Maria Elena Walker and conduct Walker was alleged to have engaged in. (GC Exh. 36). Among the complaints made were that Walker creates "a hostile and anxiety-ridden work environment by means of disparaging remarks," provides "misleading information related to disqualifications or DQs of contract interpreters," "slander[s] colleagues," and "continuously pressures interpreters into attending the Southern California School of Interpretation for training . . ." (GC Exh. 36). The letter recommended that SOSi immediately "suspend Maria Elena Walker pending the investigation of all formal complaints presented," and also recommended the "[d]isqualification of Maria Elena Walker" as the remedy for these complaints. (*Id.*) Individual interpreters, including Patricia Rivadeneira, submitted personal statements to SOSi's Human Resources Manager, Phyllis Anderson, regarding Walker's alleged misconduct, and Hilda Estrada sent another letter to Anderson and Karen Manna regarding the same complaints. (GC Exhs. 126, 153; *see also* GC Exh. 38).

In or around January 2016, California-based interpreters proposed that SOSi renounce the Southern California School of Interpretation as the company's training and education institution, and instead establish its own "in-house" department to recruit, educate, engage, and evaluate interpreters, which would be comprised of senior or experienced interpreters. (GC Exh. 37). These interpreters submitted a document detailing their proposal on moving these functions in house to SOSi, as follows:

> **In-house Language Unit Department**
>
> To assure adequate quality control and to assure reliability and effective contract performance, immigration interpreters with over 35 years of combined experience coupled with the highest level of expertise have participated in creating and developing the criteria and requirements necessary for the successful implementation of an in-house language unit:
>
> - Entrance exam-includes written and oral sections. In-house entrance exam to be administered to all qualified candidates.
> - Recruitment of candidates who are successful in the in-house administered entrance exam, and meet all criteria and requirements including DOJ background clearance
> - Orientation
> - Evaluation of interpreter performance during EOIR proceedings
>
> **We reject the inclusion of the Southern California School of Interpretation (SCSI).**
>
> **Conflict of Interest**
>
> - SCSI's experience is limited at best; having offered instruction for immigration proceedings for less than 18 months, and to a limited number of individuals.
>
> - Our **In-house Language Unit Department** drastically lowers, and in many cases cuts costs incurred through the inclusion and contracting of any third party.
>
> - Our **In-house Language Unit Department** brings to you solid high-rated performance evaluations from the DOJ/ EOIR.

(GC Exh. 37 (bolded text in original)). It is worth noting that despite these criticisms of SCSI, the record reflects that interpreters in southern California attended and were trained by SCSI many years before SOSi was awarded the EOIR Contract. (Tr. 119-120, 129 [Bejar testifies that she completed the SCSI interpreting training course in 2010.]; 316-317 [Portillo testifies that she was trained by SCSI in 2004 or 2005.]; 430-432 [Magana testifies that she completed the SCSI interpreting course at the end of 2013 or 2014.]; *see also* 714-715). In any case, prior to the submission of the above proposal, on January 16, 2016, interpreters met to discuss it. (GC Exh. 83). Hilda Estrada sent an email encouraging other California interpreters to attend an information meeting about it, which ultimately occurred on January 16, 2016. (GC Exh. 83).

California interpreters also raised concerns about the disqualification process. On February 29, 2016, a group referred to as "E.O.I.R. Contract Interpreters," with an address of 643 South Olive Street, Suite No. 612, Los Angeles, California 90014, sent a letter to Fayne Overton, the Court Director for the Immigration Court at 606 Olive Street in Los Angeles, and to Karen Manna. (GC Exh. 39). This letter explains that "[o]ur California group has experienced an unprecedented number of disqualifications" this week without any written explanation, verbal explanation nor any follow up from SOSi[ ]. . ." (*Id.*) To remedy these issues, the letter recommended that EOIR and SOSi: (1) reinstate interpreter Diana Illarraza, who had previously been disqualified, (2) issue a formal apology to Illarraza for her disqualification, (3) pay Illarraza her lost wages as a result of work she missed because of her disqualification, and (4) provide details about the reinstatement and evaluation process for interpreters. (*Id.*)

In addition, on August 25 and 26, 2016, interpreters, including Jo Ann Gutierrez Bejar, Maria Portillo, Stephany Magana, Hilda Estrada, Patricia Rivadeneira, Irma Rosas, and others participated in public protests against DOJ, the EOIR, and SOSi in Los Angeles. (Tr. 111, 294,

416, 646, 757-758, 832, 1459-1460). Hilda Estrada and other interpreters coordinated these demonstrations. (*See* Tr. 646). Interpreters carried signs at the demonstrations, which read "Shame on DOJ for turning a blind eye on justice!" (GC Exh. 172).

K. Alleged Discriminatees

With respect to all of the alleged discriminatees, save Espinosa and Rosas, Claudia Thornton was involved in making the decision not to renew their ICAs. (Tr. 1393). Specifically, Thornton explained that SOSi had "bent over backwards" to help Portillo and other California interpreters, "to give them as many cases as we could, to work with them, and they were constantly working against the interest of the Company . . . they were rallying interpreters across the country with allegations that weren't true, things that they didn't know about, and trying to work against the Company constantly, and I couldn't understand why they should continue to be rewarded with more work when they were pretty much trying to sabotage what we were doing." (Tr. 1394). In Thornton's view, these interpreters were difficult to deal with and did not support SOSi's client, the DOJ EOIR Program, or SOSi in a positive manner. (*See* Tr. 1393-1394, *see also* R. Exh. 25. Therefore, SOSi exercised its judgment and contractual right to cease its working relationship with these interpreters in late August 2016. (*See* Tr. 1393-1394).

1. Jo Ann Gutierrez Bejar

On November 2, 2015, Bejar signed her ICA with SOSi to provide Spanish interpretation services to the Immigration Courts. (GC Exhs. 4, 6). The term of the ICA was from November 2, 2015 to August 31, 2016. (GC Exh. 4 ¶ 2). Bejar testified that since about 2007, she has operated her own interpreting business under the name Pazamor Certified Translations. (Tr. 116-118). It is a sole proprietorship, and Bejar registered a business license with the state of California in the name of Pazamor Certified Translations. (*Id.*) Notably, the email correspondence that Bejar

exchanged with SOSi and its regional coordinators included "Pazamor Certified Translations" in the signature block, and the email address that Behar used to communicate with SOSi was the one related to her business, namely joann@pazamortranslations.com. (GC Exh. 10).

Prior to contracting with SOSi, Bejar had worked as a Spanish contract interpreter for Lionbridge since about September 2012. (Tr. 26). To qualify to work for Lionbridge, Bejar passed an exam administered by the company, and she was also required to have at least one year of language interpreting experience in a legal setting. (Tr. 27). SOSi did not require Bejar to obtain any other qualifications or gain additional interpreting experience before contracting with SOSi. (*Id.*) Bejar became a California-certified interpreter in 2013. (Tr. 28).

After signing her ICA, Bejar began performing assignments for SOSi two to three days per week in the Los Angeles Immigration Courts. (Tr. 28, 47). Bejar would generally advise her regional coordinator (most frequently Haroon Siddiqi) of her availability one month in advance. (Tr. 46). Siddiqi would then offer her assignments for the month, which she would accept or decline. (Tr. 154-155, *see* GC Exh. 7).

While under contract with SOSi, Bejar regularly accepted interpretation work from other agencies and companies, including from LRA, Tony Barrier, De La Torre Interpreting, and One Call. (Tr. 44). Bejar testified that she worked for these other agencies one to two days per week while working for SOSi, and Bejar reported this other income on her 1099 Forms. (Tr. 44, R. Exhs. 1, 2). Bejar testified that she gave SOSi's assignments "priority" because SOSi paid more and because Bejar preferred working at the EOIR Immigration Courts. (Tr. 44). For these other agencies, Bejar generally interpreted in legal and other settings, including depositions, medical appointments, city meetings, and workers' compensation hearings. (Tr. 133).

While in the Immigration Courts, Bejar interpreted either using the consecutive or simultaneous modes of interpretation, as directed by the judge or other court personnel, not SOSi. (Tr. 150). Bejar further testified that SOSi never told her how to interpret, and the extent of her communications with SOSi related to scheduling and receiving interpreting assignments. (Tr. 151-152). At the Immigration Courts, Bejar used the EOIR's DAR audio equipment, which she acknowledged was owned and provided by the Immigration Court. (Tr. 73). Bejar also acknowledged that SOSi had no control over whether a judge would give Bejar a lunch or bathroom break. (Tr. 75). Bejar testified that she was supposed to be evaluated by SOSi, however, this never occurred. (Tr. 93).

On August 24, 2016, Bejar received an email from Claudia Thornton stating:

> SOSi will not be extending your current Independent Contractor Agreement (ICA) for court interpreter services. Your current agreement expires on August 31, 2016 and we appreciate the support you have provided to this effort.

(Tr. 108, GC Exh. 42). The following day Bejar participated in demonstrations protesting DOJ, EOIR, and SOSi in Los Angeles, California. (Tr. 111).

2. Maria Portillo

On October 31, 2015, Portillo signed her ICA with SOSi to provide Spanish interpretation services to the Immigration Courts. (GC Exh. 43). The term of Portillo's ICA was from October 26, 2015 to August 31, 2016. (GC Exh. 43 ¶ 2). Portillo testified that she does not have a registered business license with the state of California. (Tr. 224). However, Portillo does have a business organization name – "Portillo's Interpretation Services," which she allegedly used for her Costco membership only. (Tr. 224-225).

Prior to contracting with SOSi, Portillo worked as a Spanish interpreter in the Immigration Courts under contract with Lionbridge, beginning around January 2005. (Tr. 210).

Portillo testified that she was qualified to work for Lionbridge based on her 28 to 29 years of prior interpreting experience. (Tr. 316). At Lionbridge, Portillo was classified as an independent contractor. (Tr. 308-309). SOSi did not require Portillo to obtain any other qualifications or experience before commencing work with SOSi. (Tr. 212).

Portillo testified that she regularly worked four and a half to five days per week for SOSi in the Los Angeles Immigration Courts. (Tr. 212, 226). Portillo was offered interpreting assignments from regional coordinators who sent the assignments, primarily via email and sometimes by phone, which she could then accept or reject. (Tr. 346). Haroon Siddiqi and Francis Rios were Portillo's primary regional coordinators (Tr. 342). Portillo did not accept detainee cases or cases in Adelanto, California as she did not want to work on those cases or in those locations. (GC Exhs. 56, 58). Portillo also testified that she would not accept assignments in "New York, Washington, when it's snowing . . . or Eloy, Arizona." (Tr. 344). When Siddiqi offered her these cases, she would reject them. (Tr. 344). Portillo was never evaluated by SOSi. (Tr. 264). Portillo also accepted interpretation work from other agencies and companies while under contract with SOSi. (*See* R. Exh. 4). She testified, however, that she prioritized assignments offered by SOSi because they were closer to her home. (Tr. 342).

On August 25 and 26, 2016, Portillo participated in public protests against DOJ, the EOIR and SOSi. (Tr. 294). While Portillo initially was offered a 30-day extension of her ICA, SOSi rescinded this extension after SOSi's senior management determined that it had been offered to her in error. (*Id.*) According to Portillo, on September 15, 2016, she spoke to Martin Valencia on the telephone on three occasions about SOSi's decision not to extend her ICA for the 30-day period set forth in the extension and her ICA was not renewed. (Tr. 291, 298, 300). SOSi ultimately decided not to extend Portillo's ICA because her actions and business practices

did not support SOSi's mission and obligations under the EOIR Contract. (Tr. 1393-1394, GC Exh. 73).

3. Stephany Magana

On November 2, 2015, Magana signed her ICA with SOSi to provide Spanish interpretation services to the Immigration Courts. (GC Exh. 80). The term of the ICA was from November 2, 2015 to August 31, 2016. (GC Exh. 80 ¶ 2). Magana previously worked at the Immigration Courts as a Spanish contract interpreter for Lionbridge. (Tr. 432). Magana also completed a one-year interpreting program offered by SCSI, and in December 2016, she became a California-certified interpreter. (Tr. 372, 430, 435). Magana testified that as an independent contractor she was required to obtain a business license with the state of California, which she first obtained in 2016. (Tr. 376, 434-435). Her business entity was under her legal name and she paid a fee to obtain the license. (*Id.*) Magana acknowledged that as an independent contractor she took various tax deductions related to her business entity, including for mileage, additional interpreter schooling, computer supplies, etc. (Tr. 458-459, R. Exs. 5-6).

At the time Magana signed her ICA, she believed she was an independent contractor. (Tr. 421). This belief changed because she believed SOSi was trying to "be in more control" of her and other interpreters. (Tr. 453-456). From Magana's point of view, examples of this control included email correspondence sent from SOSi to interpreters about how to use the courtroom interpreting equipment, the EOIR dress code, and other repetitive emails reminding Magana of her responsibilities under the EOIR Contract. (*Id.*)

After signing the ICA, Magana rendered her interpreting services at the Immigration Courts in Los Angeles and around the country. (Tr. 372-373, 427). Typically, Magana would send her regional coordinator her availability in advance, and the regional coordinator

subsequently would offer cases to her based on that availability, which she could freely accept or decline. (*See* Tr. 392-393). Magana testified that she prioritized her work for SOSi because SOSi's pay rates were higher. (Tr. 376). When Magana was offered travel cases, she would negotiate the pay rate with the regional coordinator. (Tr. 427). While under contract with SOSi, Magana performed work for other interpreting agencies as an independent contractor, including LRA and Access on Time. (Tr. 375).

Magana testified that SOSi did not direct her on how to interpret, and she had the authority to determine which mode of interpretation to use in the courtroom, either simultaneous or consecutive. (Tr. 438, 440-441). On occasion, an Immigration Court judge would require that Magana use one mode of interpretation over another, but SOSi never provided Magana any direction on which interpretation mode to use. (Tr. 440-441). As part of working in the Immigration Courts, Magana stated that she had to dress in a professional manner and wear a SOSi-issued identification badge. (Tr. 410-411). Magana further testified that to her knowledge SOSi did not evaluate interpreters. (Tr. 411).

On August 24, 2016, SOSi decided not to renew or extend Magana's ICA beyond its contractual termination date. (GC Exh. 132). Claudia Thornton emailed Magana and explained this decision:

> SOSi will not be extending your current Independent Contractor Agreement (ICA) for court interpreter services. Your current agreement expires on August 31, 2016 and we appreciate the support you have provided to this effort.

(GC Exh. 132). On August 25 and 26, 2016, Magana participated in public protests against DOJ, the EOIR and SOSi. (Tr. 416).

4. Hilda Estrada

On October 31, 2015, Estrada signed her ICA with SOSi to provide Spanish interpretation services to the Immigration Courts. (GC Exh. 113). The term of the ICA was from October 26, 2015 to August 31, 2016. (GC Exh. 113 ¶ 2). Estrada testified that she maintains a registered business with the County of Los Angeles, which licenses her to provide interpreting services in the county. (Tr. 587). The business entity is a sole proprietorship, and Estrada sometimes employs other individuals in her interpreting business. (Tr. 588).

Prior to contracting with SOSi, Estrada worked as a Spanish interpreter under contract with Lionbridge beginning on January 6, 2009. (Tr. 584). To qualify to work for Lionbridge, Estrada passed an examination administered by the company, and she was also required to have at least 2 years of foreign language interpreting experience in a legal setting. (Tr. 585). Beyond what Lionbridge required, SOSi did not require Estrada to have any additional experience or training. (Tr. 584).

After signing her ICA, Estrada continued working at the Immigration Courts in the Los Angeles area. (Tr. 587). Estrada testified that she was typically offered assignments from SOSi's regional coordinators one month in advance, which she could freely accept or reject, noting that "[t]hat's the understanding, when you're an independent contractor." (Tr. 699). Further, while under contract with SOSi, Estrada accepted interpretation work from other agencies and companies. (Tr. 608-609). Estrada also performed freelance editing and writing work while under contract with SOSi. (Tr. 609).

On August 24, 2016, SOSi decided not to renew or extend Estrada's ICA beyond its contractual termination date. (GC Exh. 132). Claudia Thornton emailed Estrada and explained:

> SOSi will not be extending your current Independent Contractor Agreement (ICA) for court interpreter services. Your current agreement

> expires on August 31, 2016 and we appreciate the support you have provided to this effort.

(GC Exh. 132). On August 25 and 26, 2016, Estrada participated in and helped coordinate public protests against DOJ, the EOIR and SOSi. (Tr. 646). In around June 2017, Estrada began working for the Communications Workers of America. (Tr. 650).

5. Rosario Espinosa

On February 17, 2016, Espinosa signed her ICA with SOSi to provide Spanish interpretation services to the Immigration Courts. (GC Exh. 96). The term of the ICA was from February 17, 2016 to August 31, 2016, and it was later extended to September 30, 2016. (*Id.*, GC Exh. 98).

Prior to contracting with SOSi, Espinosa rendered interpretation services to the Immigration Courts under contract with Lionbridge. (Tr. 479). In terms of educational background, Espinosa obtained the equivalent of a Juris Doctorate in Argentina, and to become skilled in court interpreting, she took courses online offered by SCSI. (Tr. 481-482). To qualify to work for Lionbridge, Espinosa passed an exam administered by Lionbridge, which tested her skills and proficiency in various modes of interpreting, including telephonic interpreting, in-person consecutive and simultaneous interpreting, and sight interpreting. (Tr. 480-481). She was also required to have previous experience interpreting in a courtroom setting, which she did. (*Id.*) SOSi did not require Espinosa to take any additional classes prior to contracting with SOSi. (*See* Tr. 481).

In December 2015, Espinosa became aware of a group of Spanish interpreters from southern California, who were trying to achieve better contract terms with SOSi. (Tr. 484-487). During this period, Espinosa exchanged emails with Hilda Estrada, who informed Espinosa about the higher pay rates that Estrada and others were negotiating for interpreters in California.

(*Id.*) SOSi eventually honored this rate for Espinosa, and she thereafter executed an ICA containing these rates. (GC Exhs. 91-93, 96).

While under contract with SOSi, Espinosa worked three to four times a week at the Immigration Court in San Francisco only. (Tr. 482, 496). To receive her assignments, Espinosa would typically provide SOSi's regional coordinators with her availability for a particular month and then the regional coordinators would offer her case assignments. (Tr. 503-504). Espinosa could decline cases, and regional coordinators would not be upset if she did. (Tr. 504).

While at the Immigration Court, Espinosa utilized either the simultaneous or consecutive mode of interpretation. (Tr. 577). The particular mode of interpretation was dictated by the judge's preference, as was Espinosa's ability to take breaks. (Tr. 577-579). Espinosa had a SOSi-issued identification badge that she wore while in the courthouse. (Tr. 503).

While under contract with SOSi, Espinosa performed work for other clients, including law firms and other freelance interpreting agencies, such as ProCare, Access On Time, and Fluent/Pacific Interpreters. (Tr. 562, R. Exh. 8). Espinosa was also employed with Stanford University and performed interpretation work for the University's children's hospital while under contract with SOSi. (Tr. 496, R. Exh. 7). Unlike her arrangement with SOSi, as a Stanford University employee, Espinosa earned $38.50 per hour with an 8-hour guarantee of work. (Tr. 496, 551).

On September 12, 2016, Espinosa received the Spanish Request for Quotation ("RFQ") email from SOSi, inviting Espinosa to submit a proposal for a renewed ICA. (GC Exh. 99). In the RFQ, Espinosa was instructed to offer a bid to SOSi, but not to exceed $35 per hour. (*Id.*) After receiving this letter, Espinosa spoke to Jessica Hatchette and explained that she had other contracts with interpreting agencies that paid $60 per hour, so she would not accept the pay rates

proposed by SOSi in its RFQ. (Tr. 525-526). On September 19, 2017, Espinosa submitted a counterproposal to the RFQ, which was for her to continue under her existing rate structure for an additional year. (Tr. 527-528, GC Exh. 101).

Thereafter, on or around September 18, 2016, SOSi discovered that a defective link was sent to some interpreters in the RFQ email that SOSi sent out in early September 2016. (Tr. 1340-1341, GC Exh. 293). Through its investigation, SOSi learned that Espinosa was one of a number of interpreters who inappropriately shared a faulty link contained in the RFQ that contained personal information related to other interpreters (including Maria Elena Walker), rather than Espinosa's personal contract documents. (*Id.*) Espinosa's conduct during this investigation resulted in the following email being sent to her on September 27, 2016 by Jessica Hatchette:

> SOSi's IT department has been tracing your unique Request for Quote email link and we have determined that you improperly forwarded and shared this link with other third parties despite clear instructions not to do so. When SOSi questioned you about your actions, you were not forthcoming or truthful. Initially, you denied sharing the link. Then, you claimed you could not recall whether you shared the link. Then, you stated that you shared it with a friend to help you, and later admitted that you shared it with another interpreter. However, SOSi's computer tracing records show that you, in fact, shared the link repeatedly with others the previous day.
>
> Your conduct, and particularly your lack of candor, are not acceptable and violate your obligations to SOSi under your Independent Contractor Agreement. Accordingly, SOSi has made the decision to terminate your Independent Contractor Agreement, effective immediately. SOSi also will be considering possible legal proceedings for improper disclosure and downloading of information that is clearly confidential and proprietary in nature.

(GC Exh. 103).

SOSi's investigation revealed that Espinosa was one of several interpreters who had repeatedly accessed and downloaded another interpreter's confidential data. (*Id.*, GC Exh. 103,

see also R. Exh. 17). At the hearing, Hatchette recounted how she reached the conclusion that Espinosa improperly accessed another interpreter's confidential information and the telephone conversation Hatchette had with Espinosa regarding this incident:

> Q: And tell me how you reached that conclusion.
>
> A: I reached that conclusion by analyzing the data that came out of Egnyte, showing that Rosario's unique email link was sent – that was marked confidential and proprietary and that was intended for her only – there is a – you know, that was – it was clearly marked, was shared with many interpreters . . . And so I looked at all of the links that were sent to Rosario and how many times the same documents of other interpreters were downloaded and all the IP addresses that were linked to those downloads. and I made the determination that she inappropriately forwarded those links. . .
>
> Q: In this – General Counsel's 103, the second paragraph, your email says, "Your conduct and particularly your lack of candor are not acceptable and violate you obligations." What did you base your conclusion that there was a lack of candor on?
>
> A: She was not being forthcoming with what happened. And she changed her story three times on the phone call.

(Tr. 1352-1354, R. Exh. 17). Espinosa confirmed that when Hatchette first asked her whether she had shared the faulty link with other interpreters she denied doing so and then later changed her response, admitting to Hatchette that she shared the link with two other individuals, one of whom was an interpreter and one of whom was a friend. (Tr. 555-556). Because SOSi's investigation revealed that Espinosa had accessed, downloaded and shared another individual interpreter's confidential information and data, her ICA was terminated. (Tr. 1340-1341, 1348-1350, 1352-1356).

6. Patricia Rivadeneira

On October 31, 2015, Patricia Rivadeneira signed her ICA with SOSi to provide Spanish interpretation services to the Immigration Courts. (GC Exh. 139). The term of the ICA was from

October 26, 2015 to August 31, 2016. (*Id.*) Prior to contracting with SOSi, Rivadeneira worked as an independent contractor for over 14 years with various other companies that provided interpretation services to the Immigration Courts. (Tr. 712-713). To qualify to work as an interpreter, Rivadeneira took courses at SCSI. (Tr. 714-715).

After signing her ICA, Rivadeneira interpreted at the Immigration Court located in Adelanto, California, although Rivadeneira occasionally accepted assignments in Los Angeles as well. (Tr. 715). Similar to other interpreters, Rivadeneira received her assignments from SOSi's regional coordinator about one month in advance. (Tr. 732, GC Exh. 143). While at court, Rivadeneira was provided with a lunch break, although she stated that this could sometimes be denied because of the court's schedule. (Tr. 736-737).

When Rivadeneira had complaints about the EOIR interpreter program or the Immigration Court, such as with lengthy security lines, she would make the complaints to an EOIR interpreter supervisor named Rene (last name unknown). (Tr. 770-773, 776). Rivadeneira testified that Rene, who is not employed by SOSi, supervised the EOIR staff interpreters and SOSi's interpreters. (*Id.*) Rivadeneira further testified that if an interpreter was ill, then Rene would get involved. (Tr. 776). Rene would assist Rivadeneira with problems she had with the Immigration Court's security personnel as well. (Tr. 770-773).

On August 24, 2016, SOSi decided not to renew or extend Rivadeneira's ICA beyond its contractual termination date. (GC Exh. 157). Claudia Thornton emailed Rivadeneira and explained:

> SOSi will not be extending your current Independent Contractor Agreement (ICA) for court interpreter services. Your current agreement expires on August 31, 2016 and we appreciate the support you have provided to this effort.

(GC Exh. 157). On August 25 and 26, 2016, Rivadeneira participated in public protests against DOJ, the EOIR and SOSi. (Tr. 757-758).

7. Kathleen Morris

On or about December 1, 2015, Morris signed her ICA with SOSi to provide Spanish interpretation services to Immigration Courts located in Chicago, Illinois. (GC Exh. 222, Tr. 987). The term of the ICA was from November 28, 2015 to August 31, 2016. (*Id.*) Prior to contracting with SOSi, Morris rendered interpretation services to the Chicago Immigration Courts as an interpreter under contract with Lionbridge. (Tr. 986). To become an interpreter, Morris testified that she initially received training while on-the-job and later obtained a master's degree in the topics of interpretation and translation in May 1987. (Tr. 1016-1017).

Prior to signing her ICA, Morris negotiated with SOSi's recruiter over the terms of her ICA. (Tr. 1025). Morris proposed that SOSi pay her a flat half-day and full-day rate for work, rather than the hourly rate structure that SOSi had initially proposed. (Tr. 1026). Eventually, Morris and SOSi's recruiter agreed upon a rate of $201 for a half day of work and $320 for a full day of work. (Tr. 1026). Morris understood that SOSi was engaging her as an independent contractor, not an employee. (Tr. 1026-1027).

Morris worked at the Immigration Courts in the Chicago area about three to three-and-a-half days per week. (Tr. 988). When Morris was not working at the Immigration Courts for SOSi, she performed interpreting work at the U.S. District Court as an independent contractor interpreter and at the Cook County Courts as an employee interpreter. (Tr. 989, 1021-1022). She occasionally performed interpretation services for the TransPerfect translation agency while under contract with SOSi as well. (Tr. 1022-1023).

In around March 2016, Morris registered two complaints with Claudia Thornton about the condition of the DAR interpreting equipment in the Chicago Immigration Courts and about accessing the courts, particularly where detainee cases were heard. (Tr. 1029, GC Exhs. 226, 227). Although Morris initially testified that she did not know that the interpreting equipment was owned by the Immigration Courts, she later contradicted this testimony by acknowledging that Thornton told her in this email exchange that SOSi would have to work with the appropriate Immigration Court personnel to monitor the status of the equipment. (Tr. 1030, GC Exh. 226). This testimony is further contradicted by the various emails Morris sent to Thornton regarding the non-functioning DAR equipment, which demonstrated that Morris clearly understood that EOIR owned this equipment. (*See e.g.*, GC Exh. 227, p. 5).[20]

On or around August 28 or 29, 2016, Morris spoke to Thornton over the telephone and learned that SOSi decided not to renew her ICA beyond August 2016. (Tr. 1012).

8. Irma Rosas

Irma Rosas testified that she provided Spanish interpretation services for SOSi from November 1, 2015 to late September 2016. (Tr. 781, 878). As part of establishing and maintaining her independent interpreting business, Rosas obtained a business entity license under her name, "Irma Rosas" in the City of Moreno Valley, California, which she first obtained in 2005 or 2006 and later suspended in 2016. (Tr. 798, 866). To keep her business license active, Rosas paid a yearly fee of $80 to $100. (*Id.*) Further, Rosas testified that her business entity is a sole proprietorship with a unique tax EIN number, and Rosas employs several employees and

[20] Morris's credibility was further undermined at the hearing when she denied recalling that Thornton had told her in a conversation that the EOIR, not SOSi, disqualifies interpreters, even though she later acknowledged that she wrote an email to Thornton stating that "Ms. Thornton pointed out that SOSi does not disqualify interpreters." (Tr. 1032-1033, GC Exh. 226, p. 3).

rents out interpretation equipment as necessary to perform interpreting services for her interpreting clients. (*Id.*) Rosas maintains an internet website at *www.interpreter4U.com* for her interpreting business and she has maintained that website since approximately 2006. (R. Exh. 13). The website lists, among other things, the interpreting equipment that Rosas uses, owns and rents out. (*Id.*) It also lists Rosas' extensive education, work experience, and various interpreting certifications. (*Id.*)

While working with SOSi, Rosas worked at the immigration courts located in Adelanto, San Diego and Los Angeles, California. (Tr. 785, 1458). Rosas also testified that she regularly accepted assignments in Los Angeles and San Diego on dates when she was not otherwise assigned to cases in Adelanto. (*Id.*) Prior to late August 2016, Rosas accepted cases in Los Angeles at her contractual local rate of pay, which was $225 for half-days and $425 for full-days of work. (Tr. 1458-1459, GC Exh. 176, *see* GC Exh. 166). Rosas further testified that she could reject assignments and that she also performed work for other entities while under contract with SOSi, including the California Unemployment Insurance Appeals Board, California Child Protective Services, and a private company named iInterpret. (R. Exh. 13 [Rosas' Resume]).

On August 25 and 26, 2016, a substantial number of interpreters in Los Angeles suddenly and unexpectedly cancelled their case assignments for these days, and some participated in a public protest against DOJ, the EOIR, and SOSi. (Tr. 832, 1459-1460). Rosas was one of many interpreters who participated in this protest, though she was not scheduled to work assignments at the Immigration Courts on those dates. (*Id.*) Because many interpreters unexpectedly cancelled their assignments on these days, SOSi took steps to ensure that its Los Angeles cases were sufficiently covered during these days and the subsequent week. (Tr. 1460). In the past, Rosas had accepted assignments in Los Angeles, as well as in Adelanto for her local rate of pay. (GC

Exhs. 166, 176). And in fact, between April and August 2016, Rosas had accepted over 20 cases in Los Angeles at her local rate of pay. (*Id.*) Since Rosas had previously accepted Los Angeles cases at her local rate, Siddiqi decided to switch Rosas's cases for Adelanto to a local interpreter, and asked Rosas to take substitute cases in Los Angeles. (Tr. 1460-1461). Upon being so notified on August 26, 2016, Rosas responded that she would only accept the Los Angeles cases if they were full-day assignments and only for a higher pay rate of $550. (*Id.*). Siddiqi responded on August 27, noting that Rosas previously had covered half-day cases in Los Angeles for $225, but in light of her position, he would only offer her cases in Adelanto. (GC Exh. 174). While this may have reduced to some degree Rosas's opportunities, she nevertheless was offered, and confirmed at least 20 regular cases for September. (Tr. 843, 1462).

On September 12, 2016, Rosas received a Request for Quotation ("RFQ") email from SOSi, containing a renewed, proposed ICA and inviting her to submit a quote. (GC Exhs. 183, 184). On September 19, 2016, Rosas advised SOSi that she was rejecting SOSi's terms for submitting a quote and would not accept the proposed ICA. (GC Exh. 187). On September 27, 2016, SOSi emailed Rosas, stating that it could not accept her proposed counteroffer. (GC Exh. 188). Rosas did not respond or submit any additional proposals after SOSi rejected her counteroffer. (Tr. 858). Therefore, Rosas voluntarily ended her working relationship with SOSi in late September 2016. (Tr. 879).

L. Haroon Siddiqi Allegations

Paragraph 11 of the Consolidated Complaint alleges that on August 26, 2016, Haroon Siddiqi, by text message and over the phone, interrogated, surveilled, created the impression of surveillance, and impliedly threatened interpreters because of their protected concerted activities.

These allegations are based on the testimony of Aracely Weiherer. Siddiqi testified in response to these allegations.

Siddiqi was Weiherer's regional coordinator. (Tr. 889). In that role, Siddiqi offered and scheduled Weiherer for interpreting assignments via email and telephone at the Immigration Courts in Lancaster and Adelanto, California and "rarely" in Los Angeles, California. (Tr. 888-889). Weiherer testified that around the end of August 2016, Siddiqi offered her interpreting assignments at the Immigration Courts in Los Angeles for August 25, 2016 to fill confirmed cases that had been unexpectedly cancelled at the last minute by interpreters due to the protest set for that day. (Tr. 890-891, 1460). In response to Siddiqi's offer of cases, Weiherer rejected them, sending Siddiqi a text message at 10:46 a.m. containing a photograph of the protests with the message "I'll be eating alive [*sic*] if I go to Los Angeles. Sad!!!" (GC Exh. 191, Tr. 893).

During this same conversation, Weiherer then sent Siddiqi a series of additional photographs via text message of the August protest and of individual interpreters, identifying various interpreters by name. (GC Exh. 191, Tr. 890-891). Weiherer obtained many or all of the photographs from WhatsApp messaging application used by the interpreters to communicate with one another as she did not attend the August 2016 demonstrations in person. (*See* GC Exh. 191, Tr. 890-891). Siddiqi acknowledged exchanging text messages with Weiherer, but testified that she initiated these communications by voluntarily sending him information regarding the activities of other interpreters. (Tr. 1463-1464).

M. <u>September 2016 – Data Security Breach</u>

Because all of SOSi's initial ICAs were set to expire on August 31, 2016, SOSi began communicating electronically with interpreters in August 2016 regarding renewed agreements. (Tr. 1319-1321). These communications were facilitated through Egnyte, a secure file-sharing

portal, and SOSi's Senior Subcontracts Manager, Jessica Hatchette sent the majority of them. (*See id.*, Tr. 1338). The communications provided each interpreter with a unique link through which he or she could access personal contract documents and could upload signed documents. (*Id.*)

Unfortunately, on or around September 18, 2016, SOSi discovered that a faulty link was sent to some interpreters, which allowed access to private and confidential information relating to other interpreters, most notably Maria Elena Walker, rather than the email recipient's personal information. (Tr. 1337; GC Exhs. 293, 294). Upon learning of this error, SOSi sent an email to the interpreters alerting them to the data breach. (*See e.g.*, GC Exh. 102, Tr. 1338-1339). Thereafter, SOSi undertook an extensive digital forensic examination in an effort to contain the breach to the greatest extent possible. (Tr. 1339-1341, 1348-1350, 1352-1356). This investigation revealed that a number of interpreters who had received the erroneous link had repeatedly accessed and downloaded Walker's personal documents and information, and many had forwarded the link to other individuals, including Maria Portillo and Rosario Espinosa. (*Id.*, *see also* R. Exh. 17).

As SOSi identified interpreters who had improperly accessed Walker's personal data and/or forwarded the link to others, Hatchette began calling these interpreters to advise them of what SOSi's investigation had uncovered and to request that they cease such improper actions immediately. (Tr. 1339-1341). Upon receipt of the defective link, which contained personal data and information related to another interpreter, interpreters immediately knew that this was confidential information that was not intended for their eyes and that should not be shared with others. (Tr. 1347-1349). Further, SOSi notified the interpreters of the breach and that the information should not be shared. (Tr. 1352). SOSi's forensic examination revealed that

seventeen interpreters made extensive use of the confidential data either by downloading the information (sometimes repeatedly) or forwarding the data or link to others. (Tr. 1354-1356, *see* R. Exh. 17). As a result, on October 6, 2016, formal cease and desist letters were sent by SOSi's outside counsel, Akin Gump, to seventeen interpreters who were particularly egregious in their sharing of the improper link and Walker's personal data. (JX 1(uu), JX 1(tt), Tr. 1354-1356). These letters once again notified the interpreters about the data breach and that the information should not be shared. (*Id.*). Letters were not sent to interpreters who merely opened the link but made no effort to download or forward Walker's information. (Tr. 1354-1356).

N. Mid-September 2016 – Alleged Unlawful Statement by Martin Valencia

Paragraph 12 of the Consolidated Complaint alleges that on September 15 or 16, 2016, Martin Valencia, a former EOIR Contract Program Manager, told interpreters that they could not work for SOSi because of their protected concerted activities. This allegation is based on the testimony of Maria Portillo and appears to be confined to three telephone conversations between Portillo and Valencia on September 15, 2016 about SOSi's decision to not renew or extend Portillo's Independent Contractor Agreement. (Tr. 291). Portillo testified in support of this allegation. Valencia did not testify.

It is undisputed that SOSi did not extend or renew Portillo's ICA beyond its contractual August 31, 2016 termination date. (Tr. 288, 1393, GC Exh. 68). While Portillo was initially offered a 30-day extension of her ICA, SOSi rescinded this extension after SOSi's senior management determined that it had been offered to Portillo in error. (GC Exh. 73). According to Portillo, on September 15, 2016, she spoke to Valencia on the telephone on three occasions about SOSi's decision not to renew her ICA and the reasons for that nonrenewal. (Tr. 291, 298).

Portillo testified that over the course of these calls, Valencia told her that her ICA would not be extended or renewed. (Tr. 292, 294, 297).

O. Challenged Policies

Paragraphs 15, 16, 17, and 18 of the Consolidated Complaint allege that certain provisions or attachments included with the interpreters' ICAs are unlawful under the Act, including (1) a Publicity Clause, (2) a Confidentiality Agreement for Contractors, (3) certain sections of SOSi's Code of Business Ethics and Conduct, and (4) Canon 6 of the Code of Professional Responsibility. The relevant text of these clauses and sections are set forth hereafter in the Argument section of this brief.

ARGUMENT

A. The Interpreters Are Independent Contractors. No Misclassification Occurred.

The overriding issue presented in this case is whether the interpreters are "independent contractors" or "employees," within the meaning of the Act. The basic legal principles and factors underlying this determination are relatively easy to state, but often challenging to apply. Consequently, Board members frequently have disagreed over the years regarding how to apply the pertinent factors, and the development of the law has not been in a straight line. One might fairly say that the decisions penned by the various Board members (regardless of ideology) have taken on something of a result-oriented hue, depending upon each member's personal view of the difference between an employee and an independent contractor. Two members see the same set of facts, but one says red while the other says green. This is perhaps understandable given that the relevant factors are somewhat malleable, but it presents a challenge to judges who are merely attempting to apply "Board law" fairly and consistently, as well as to parties who are attempting to structure their relationships in a mutually satisfactory manner.

1. Guiding Principles and Factors

Section 2(3) of the Act explicitly excludes from the definition of "employee" any "individual having the status of an independent contractor." 29 U.S.C. § 152(3). "The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act." *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968). The Board and the courts historically have looked to the factors set forth in the Restatement (Second) of Agency § 220 (1958):

> (a) The extent of control which, by the agreement, the master may exercise over the details of the work;

(b) Whether or not the one employed is engaged in a distinct occupation or business;

(c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) The skill required in the particular occupation.

(e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.

(f) The length of time for which the person is employed.

(g) The method of payment, whether by the time or by the job;

(h) Whether or not the work is part of the regular business of the employer;

(i) Whether or not the parties believe they are creating the relation of master and servant;

(j) Whether the principal is or is not in the business.

"[A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context be assessed in light of the pertinent common-law agency principles." *United Insurance*, 390 U.S. at 258. The Restatement factors are nonexclusive and "other relevant factors may be considered, depending on the circumstances;" further, "the weight to be given a particular factor or group of factors depends on the factual circumstances of each case." *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 611 (2014). The Board also has considered, as an additional factor, the entrepreneurial opportunities for gain or loss. *Id.* at 612. "Related to this question, the Board has assessed whether purported contractors have the ability to work for other companies, can hire their own employees, and have a proprietary interest in their work." *Id.*

2. The Total Factual Context

In most cases, the Board discusses each factor separately and in the order set forth in the Restatement. In Respondent's view, however, doing so distracts from the overall assessment "of the total factual context" and leads to a mechanical analysis. Although no single factor is determinative, the Board has never held that all factors are entitled to equal weight. Indeed, it has held the exact opposite:

> Not only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other.

Roadway Package System, Inc., 326 NLRB 842, 850 (1998) (quoting *Austin Tupler Trucking*, 261 NLRB 183, 184 (1982)).

Significantly, there are no reported Board cases that address the status of court interpreters. Thus, this is a question of first impression. We start with the overall factual setting in which this case arises. EOIR is responsible for the operation of all immigration courts throughout the United States. As one would expect, immigration courts could not function without interpreters. Aliens who appear as respondents in the immigration courts arrive from all over the world and speak a myriad of different languages. Few are fluent in English. Inasmuch as immigration court proceedings are conducted in English, it is necessary that all statements made by the respondent in his/her native language be interpreted in English and that all statements/questions from the court or attorneys be interpreted into the respondent's native language. EOIR employs a small number of staff interpreters at various immigration courts. EOIR indisputably is itself an arm of the United States and exempt from coverage under the Act. The vast majority of interpreters who work in the immigration courts are obtained through

federal contracts with private companies. For many years, Lionbridge was the designated contractor through whom EOIR obtained interpreters. Although EOIR does not mandate that such outside interpreters be either employees of the contractor or independent contractors, it is undisputed that historically, all interpreters provided by Lionbridge were viewed and treated as independent contractors of Lionbridge.

In the summer of 2015, the EOIR Contract was placed up for competitive bid, and SOSi was the successful bidder. SOSi is a government contractor, and it maintains a number of contracts with different government agencies. The EOIR Contract is but one of these contracts. SOSi does not operate, control, or have any stake in the EOIR or the Immigration Courts. It employs no interpreters of its own, and it functions primarily as a liaison between EOIR and the national community of interpreters. Rather than EOIR contract directly with interpreters, SOSi assumed that function on behalf of EOIR. Thus, SOSi's primary function under the EOIR Contract is to do EOIR's bidding by assuring that when EOIR places an order that order is filled with a qualified interpreter.

When SOSi acquired the EOIR Contract in July 2015, it did not foresee the difficulties it would encounter in having a sufficient roster of qualified interpreters to fill all of the orders that would be placed. Naively perhaps, it assumed that it could immediately contract with Lionbridge's base of interpreters. This, however, was not to be for several reasons. First, SOSi had difficulty obtaining meaningful contact information for the Lionbridge interpreters. SOSi and Lionbridge are competitors, and Lionbridge viewed its database as proprietary. Eventually, however, SOSi was able to obtain interpreter names without addresses or phone numbers. Through internet searches, SOSi began to identify potential interpreters. A second problem, however, arose. In particular, SOSi had aggressively bid the EOIR Contract, believing that it

could obtain interpreters at certain hourly rates. It did not anticipate the resistance it would meet and the banding together of the national interpreter community to negotiate compensation rates that were substantially higher than what SOSi had negotiated with EOIR. This resistance turned out to be well organized and intense. Armed with the knowledge that there were only a limited pool of interpreters and SOSi's known difficulty in subcontracting with this pool of candidates, interpreters refused to work for the rates initially being offered by SOSi and its proposed subcontractors until their demands had been met, resulting in multiple negotiations both on an individual basis and with groups of interpreters.

In southern California, the interpreters had formed an alliance and had even rented office space across from the Los Angeles courthouse. This alliance was led by Hilda Estrada, Diana Illaraza, and Angel Garay. What followed was a series of conference calls between this group of interpreters and SOSi's two program managers at the time, Martin Valencia and Claudia Thornton, in which the terms of the ICA were negotiated in detail. One objection that the interpreters had to the proposed ICA was its length, some 24 pages plus exhibits. Other objections concerned the issue of exclusivity, a 24-hour cancellation policy, and half day/full day rates. Regarding exclusivity, the interpreters were particularly concerned about a proposed provision that they viewed as unduly limiting their opportunity to pursue other interpreting assignments. It is unrefuted that during these calls, the interpreters expressed a specific desire to be independent contractors and not employees. The interpreters wanted the flexibility that is inherent in being an independent contractor as opposed to being an employee. The agreement was modified to make this intent more clear. The interpreters also successfully negotiated half day and full day rates that were substantially higher than what they had been paid at Lionbridge. The reality was that SOSi could not fulfill its contractual obligations without reaching

agreements with the interpreters, and the interpreters used this leverage to negotiate very favorable terms.

SOSi provides no tools or equipment to the interpreters, and maintains no facility where interpreters gather or are based. Instead, the interpreters operate out of their homes and they perform their services at the EOIR immigration courts. SOSi has no control over these courts and no physical presence at the courts. The interpreters are highly skilled and they perform their services without any actual supervision or oversight by SOSi. Indeed, SOSi's regional coordinators never meet the interpreters face to face, and these coordinators do not have the qualifications that would be necessary to evaluate interpreters. Insofar as the work of the interpreters is monitored and critiqued, such evaluation comes from the immigration judges and LSU. All "counselings" and "disqualifications" are initiated by LSU, and the policies with which the interpreters must abide are those imposed by the courts and EOIR.

The interpreters are completely free to accept or reject offered assignments as they wish. Some interpreters work fairly regularly at the immigration courts and others work only sporadically. Most interpreters perform interpreting services for other clients, often on a regular basis. They file tax returns as independent contractors and take deductions available to independent contractors.

In this factual context, it seems clear that certain of the Restatement factors are entitled to greater weight and significance than others. It also is apparent that some of the factors overlap and properly may be grouped together. While there is no hard and fast formula by which the various factors should be ranked, SOSi contends that the two most important factors in this case are the intent of parties and the control exercised by SOSi over the details of the work. Also of particular significance are the type of occupation, the skill required, industry practice, manner of

payment, and entrepreneurial opportunity. The remaining factors must also be considered, but the record suggests that the parties themselves viewed these other factors as of lesser importance.

3. The Intent of the Parties Heavily Favors Independent Contractor Status

The common law has always recognized the intent of the parties as "a significant factor" in determining whether an individual is an employee or an independent contractor. *Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d 1096, 1103 n. 9 (5th Cir. 1990); *accord, Crew One Productions, Inc. v. NLRB*, 811 F.3d 1305, 1312 (11th Cir. 2016) (noting agreement of Ninth and D.C. Circuits). Where the parties' contract and its negotiation reflect a common intent to create an independent contractor relationship, there is no sound reason why the Board should step in and rewrite the contract's terms. Although the contracts clause of the United States Constitution (Art. I, § 10, Cl. 1), which prohibits the impairment of contracts, is directly applicable only to the states and thus not directly restrictive of the Board, the right of private parties to independently structure their contractual relationships should not be lightly disregarded, absent compelling reasons to do so. Of course, where the intent is reflected solely in the written agreement itself and that agreement is the product of fraud or duress, the Board, or a court, may find that the agreement does not truly establish mutual intent to create an independent contractor relationship. *See Penn*, at 1103 ("Penn never suggests that he was coerced into signing the Design Services Agreement or that the Agreement was a sham"); *Crew One*, at 1312 ("If the Board had found fraud, duress, or some other defense to formation, it would have been correct to disregard the agreements"). Absent such evidence, however, the intent of the parties becomes critical because it often "sheds light on a number of other factors, such as 'method of payment,' 'provision of employee benefits,' and 'tax treatment of the third party.'" *Penn* at 1103, n. 9.

Here, there is no evidence that the ICA was a "sham" or the product of fraud or duress. Further, the ICA contains multiple indications of an intent to create an independent contractor relationship. The agreement itself bears the title "Independent Contractor Agreement," and throughout it refers to the interpreters as "Contractors." Section 5, entitled "Independent Contractor," expressly provides that "Contractor is not an employee of the Company" and that "[t]he manner in which the Contractor's language interpretation and translation services are rendered shall be within the Contractor's sole control and discretion, provided the Work is performed in accordance with the SOW." Section 5 further provides that "Contractor shall be responsible for all taxes arising from compensation and other amounts paid under this Agreement," that there will be no withholdings by SOSi, that the interpreter is not eligible to participate in any employee benefit plan, and that SOSi will not provide any workers' compensation insurance." Section 6 of the ICA, entitled "Relationship of Parties," further emphasizes that the ICA shall not "be construed to form a partnership between the parties nor create an employment relationship." Thus, the ICA itself strongly suggests an intent to create an independent contractor relationship.

That the interpreters characterized themselves as independent contractors on their tax returns, did not identify SOSi as their employer, and took deductions that would not be available to employees also reflects a mutual intent. As one court stated:

> Indeed, though not quite rising to the level of estoppel, if a plaintiff signs a tax return "under penalty of perjury" that declares independent contractor status and seeks "numerous deductions for business purposes associated with independent contractor status, such as travel, entertainment, lodging, supplies, telephone and depreciation of business assets," such a tax return may significantly impede the plaintiff's ability to claim employee status for purposes of filing an overtime or minimum wage claim.

Deboissiere v. Am. Mod. Agency, No. 09 Civ. 2316, 2010 WL 4340642, at *3 (E.D.N.Y. Oct. 22, 2010).

The written terms of the ICA, however, are not the only persuasive evidence of the parties' mutual intent. Importantly, the ICA was not the creation solely of SOSi; rather, it was the product of intense negotiations between the interpreters and SOSi, both individually and as groups. In this regard, the parties, through their own actions, demonstrated a mutual and overriding intent to establish an independent contractor relationship. The interpreters desired such a relationship for a myriad of reasons, most notably the flexibility to turn down work and to control their own schedules, as well as the tax benefits of being an independent contractor. Independent contractor status was not unilaterally dictated by SOSi, but was a decision mutually desired by all parties. During the negotiations between SOSi and Estrada's group of interpreters, the interpreters expressly stated a desire to be treated as independent contractors, and in their written proposals, they referred to themselves as "Contractors." To this end, they successfully negotiated (some might say "dictated") substantial "above market" half-day and full-day rates, thereby recognizing that the interpreter was committing a block of time to SOSi that could not be committed to any other person or entity. The interpreters also successfully negotiated a cancellation policy under which any cancellation within 24 hours would require SOSi to pay the interpreter the half-day rate of $225. Again, this is a provision that is typical of an independent contractor, not an employee. The interpreters also made their intent clear through their objections to section 30 (Exclusivity) of the original 24-page version of the ICA. Although the original version only restricted the interpreter from accepting work from anyone other than SOSi "in connection with SOSi's Prime Contract," the interpreters were concerned that this provision might be construed more broadly to preclude them from working for other clients. In order to

resolve that concern, SOSi agreed to add language stating that the intent was merely "to ensure that each interpreter's work is properly accounted for under the Prime Contract," that the "restriction relates only to work to be performed by Contractor under the Prime Contract with DOJ EOIR," and that nothing in the ICA would "preclude Contractor from performing work under any other DOJ program or under any federal, state or local agency contract."

In these circumstances, the intent of the parties weighs very heavily in favor of independent contractor status. As discussed below, the parties' course of conduct is consistent with their mutually expressed intent.

4. SOSi Exercises No Meaningful Control Over The Details Of Interpreting.

While the presence or absence of control over the details of the work being performed may not be determinative, this factor historically has been deemed one of major significance. Indeed, courts have referred to this factor as the "most important factor" under the common law. *Crew One, supra*, 811 F.3d at 1311; *Salamon v. Our Lady of Victory Hospital*, 514 F.3d 217, 228 (2d Cir. 2008). The Supreme Court, in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989), implied that this factor was of primary significance. Thus, the Court stated that "[i]n determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished." The Court then proceeded to list "other factors relevant to the inquiry," suggesting a hierarchy in which the right to control the manner and means of performance ranks at, or near, the top. In *Metcalf & Eddy v. Mitchell*, 269 U.S. 514 (1926), the Supreme Court, while discussing the status of consulting engineers who performed contracts with states and municipalities, observed:

> In each instance the performance of their contract involved the use of judgment and discretion on their part and they were required to use their

> best professional skill to bring about the desired result. This permitted to them liberty of action which excludes the idea that control or right of control by the employer which characterizes the relation of employer and employee and differentiates the employee or servant from the independent contractor.

Id. at 521.

The record reflects that SOSi exercises no meaningful control over the manner and means in which the interpreters carry out their work. Indeed, there is little opportunity for SOSi to exercise such supervision. SOSi has no supervisors stationed at the immigration courts where all of the interpreters' services are performed. Further, the regional coordinators are not interpreters themselves and lack the skills necessary to actually direct the nature and manner in which interpreters perform their work. The only individual who has any connection to SOSi and who sometimes is present at the immigration courts is the "liaison." But the liaison is also an interpreter who provides interpreting services under an ICA in the same fashion as other interpreters. Liaisons tend to be interpreters who have performed interpretation services at the particular court for many years, including for SOSi's predecessor, Lionbridge. (Tr. 135-136, 453). The consolidated complaint does not allege that the liaisons are either "supervisors" or "agents" of Respondent, and thus whatever services they may provide SOSi in addition to normal interpreting cannot be deemed supervisory. The primary function of the liaisons is to perform an on-site orientation of the courthouse layout for new interpreters; i.e., acquaint them with the check-in window and the various courtrooms, the courthouse security procedures, and the courtroom equipment. (Tr. 71, 73, 135-136, 1172-1173, 1217-1218, 1323-1324). On occasion, a liaison may coordinate situations where one interpreter is running late and a switch can be made so that all cases are covered. Insofar as the activities of the liaisons constitute "control," this control is by the interpreters themselves and is not attributable to "SOSi." In

Minnesota Timberwolves Basketball, L.P., 365 NLRB No. 124, slip op. at 4-6 (2017), the employer's video crew included its own "director." In finding the crewmembers to be statutory employees, the Board noted that the crewmember director received considerable direction from the employer's own director. The Board, however, relied solely upon the direction given by the employer's director. The direction given by the crewmember director to other crewmembers was not considered, as it was not control by the employer. Here, the direction provided by the liaison is minimal and is based on his own knowledge and experience. The liaison does not receive any meaningful direction from SOSi.

To the extent there is any actual on-site supervision of the interpreters, such supervision comes from the EOIR staff and the immigration judges. The interpreters check in at the court window where their COIs are stamped by court staff. Inside the courtroom, all instructions come from the immigration judge. The judge is the one who directs the hearing and who signs the COI after the hearing is complete. The interpreter then checks back at the window to see if he/she is needed in another courtroom. If not, the staff member releases the interpreter for the morning or afternoon as the case may be. The notion that SOSi exerts any influence in this process, which some interpreters proclaimed SOSi to have, is on its face preposterous and easily rejected not only on the record itself, but as a matter of judicial notice. In all United States courtrooms there is a well-recognized hierarchy in which the presiding judge is at the top. The presiding judge controls the courtroom. He/she decides when a hearing will start, when breaks and lunch will occur, and when the hearing will recess for the day. He/she directs the actions of all courtroom personnel such as court reporters, bailiffs, and interpreters. While practicing attorneys largely control the presentation of their cases, they too are subject to the presiding judge's directions and decisions. A courtroom is not a democracy and there is only one person in control.

Insofar as there are any perceived problems or deficiencies in an interpreter's performance, such deficiencies are noted by the sitting judge or EOIR staff and passed on to LSU, who then forwards the complaint to SOSi with specific directions as to the corrective action that is required. LSU may direct that the interpreter be counseled or if the issue is deemed sufficiently serious, LSU may direct that the interpreter be disqualified. The disqualification may be for a particular judge, a particular court, or for all courts. SOSi has no decision making authority in this respect, and it functions primarily as a messenger between LSU and the interpreter. (Tr. 1481-1483). All evaluations of interpreters are dictated by the EOIR contract and LSU. SOSi may assist the interpreter in seeking reinstatement from a disqualification, but LSU alone determines whether or not an interpreter will be reinstated.

All of the policies that materially impact the interpreters originate from the EOIR. Thus, dress policies, security badge requirements, check in and out procedures, professional ethics codes, etc. are all established and monitored by EOIR staff and the immigration judges. In any event, it is highly questionable that these types of policies constitute the type of control over the "details" of the work that is relevant in determining whether one is an employee or an independent contractor. Every property owner has a right to establish rules and procedures regarding access to the owner's property. Such rules and procedures are often designed to ensure safety and security of the property and all persons who lawfully access the property. They may also be designed to ensure that the property is used for the purpose for which it is intended and that the rights of all persons lawfully on the property are respected. This is particularly true in a government courthouse. In this day and age, the requirement that one go through security screening, check in and out at specified locations, and wear identification badges is routine. Similarly, if a property owner wishes to establish a dress code for contractors and subcontractors

coming onto the property, that is the owner's prerogative. Such policies say nothing about the independence of such contractors and subcontractors. Again, it is hardly surprising that EOIR would raise a concern if an interpreter were to appear in court wearing jeans and a t-shirt.

The General Counsel argues that SOSi "assigns" cases to interpreters, thereby controlling their work schedules, but this is only a half-truth. Immigration court calendars are established and controlled exclusively by EOIR. Based upon EOIR's ISRs, SOSi's regional coordinators *offer* specific assignments to interpreters. Frequently, coordinators *offer* these assignments based on the interpreter's own calendar, which the interpreter has provided to the coordinator in advance. The offered assignments are for specific dates and times for the simple reason that the immigration courts have scheduled start times by which all required personnel must be present and ready to work. The courts set these times, not SOSi. But the fact remains that no interpreter is required to accept an offered assignment, and they can and do reject assignments that do not fit their schedules or if they have more lucrative opportunities elsewhere.

That each assignment has a specific start time does not detract from the independence of the interpreters. Every independent contractor must work within some time frame. In some circumstances, the contractor may simply have a deadline by which the job must be completed. For example, the sculptor who is commissioned to produce a statute may only have a deadline for completion, retaining discretion to work when he chooses so long as he meets the deadline. *Reid*, *supra*, 490 U.S. at 752-753 (finding sculptor to be independent contractor). Monetary penalties may be provided for if the deadline is not met. In other circumstances, the deadline may be quite short, as often is the case for a freelance journalist whose "story" quickly becomes stale. In yet other circumstances, a "job" or "assignment" may by its very nature require the contractor to appear and perform during a specific time slot. For example, the standup comedian who is

offered an 8:00 p.m. Thursday slot at a comedy club hardly can expect to show up and perform at 10:00 p.m. on Friday night. *The Comedy Store*, 265 NLRB 1422, 1422, 1449-1450 (1982) (finding comedians who provide recurrent performances at comedy club to be independent contractors).[21]

The General Counsel further argues that interpreters may be denied future assignments if they decline offered assignments. It is more accurate, however, to say that regional coordinators are more likely to offer assignments to interpreters who exhibit some degree of flexibility than to interpreters who set rigid parameters for any assignment. That phenomenon is not surprising, nor is it reflective of employee status. Independent contractors are business persons, and each interpreter of a specific language is a competitor of every other interpreter of that language in the same fashion that every community has multiple plumbers, electricians, and HVAC contractors. The plumber, electrician, or HVAC contractor who is never available when needed may find that calls for his/her services begin to dissipate.

Along the same lines, the General Counsel further argues that regional coordinators may take away an assignment that has already been accepted if the coordinator finds a cheaper option. This happened only rarely and only in travel cases, or in emergencies such as the unexpected walkout by Los Angeles interpreters in August 2016. Because travel rates have always been individually negotiated, it occasionally happens that a coordinator who cannot find a local interpreter will assign a case to an interpreter who must travel. If the coordinator subsequently finds a local interpreter, the coordinator may cancel the travel assignment and reassign the case to the local interpreter. But because the interpreters negotiated 24-hour cancellation clauses in

[21] Likewise, the sole practitioner attorney who agrees to defend a client in a criminal case does not become an "employee" of the client because the court sets a hearing time for arraignment, jury selection, or trial.

their contracts, SOSi can do this only if it cancels outside the 24-hour cancellation period. Any cancellation within 24 hours requires SOSi to pay the interpreter for the assignment. Again, cancellation clauses are common in the business world, and the ability to cancel and reassign is entirely consistent with independent contractor status.

All cancellations (that do not involve reassignment) are made by the courts, resulting in automated notices to the interpreter and the regional coordinator. SOSi has no control over these cancellations. But in any event, as explained above, the ability to cancel within a certain time period is indicative of independent contractor status.

In summary, SOSi exercises zero control over the details of interpreting. It also exercises no meaningful control over the interpreters themselves. Any controls, to the extent they exist, are EOIR initiated and driven. It is well established that government regulation and control will not be considered in determining whether an individual is an employee or an independent contractor. *Don Bass Trucking, Inc.*, 275 NLRB 1172, 1174 (1985). "Government regulations constitute supervision not by the employer but by the state," and "more extensive governmental regulations afford *less* opportunity for control by the putative employer." *Air Transit, Inc.*, 271 NLRB 1108, 1110 (1984) (quoting *Seafarers Local 777 (Yellow Cab) v. NLRB*, 603 F.2d 862, 875 (D.C. Cir. 1978)). In *Air Transit*, the employer contracted with the Federal Aviation Authority to provide taxi cab services at Dulles airport. It did so by using "independent" drivers. Although the FAA contract imposed extensive restrictions and regulations on the drivers and the employer, the Board declined to consider these regulations and restrictions and found the cab drivers to be independent contractors. SOSi's lack of control weighs heavily in favor of independent contractor status.

5. The Nature of the Occupation/Business, Industry Practice, and Skill Required Weigh Heavily In Favor Of Independent Contractor Status.

Certain factors often overlap and are best discussed together. Such is the case here with respect to the nature of the occupation, whether the individuals are engaged in a distinct business, the skill required, and industry practice. The interpreters indisputably are highly skilled. All have gone through specialized education and training, and many have multiple years of education. Although not required, many have sought and obtained state or federal certifications. Functioning as a competent court interpreter requires far more than being fluent in a particular foreign language. Interpreting in the Immigration Courts requires complex and specialized skills. Broadly speaking, interpreters must fully and accurately convert the foreign language speech of non-English speaking individuals into English and convert the English speech of the attorneys, judge, and witnesses into the foreign language. (GC Exh. 5, OCIJ Interpreter Handbook, pp. 1, 9). Doing this effectively requires interpreters to "listen, analyze, comprehend, and use contextual clues to convert thought from one language to another in order to immediately render a reproduction in another language of each speaker's original utterances." (JX 1(hhh), Standards Memo, p. JX000979).

Interpreters must also speak in an audible and clear voice when interpreting without distorting, supplementing, summarizing, or altering in any way the statements given by the original speaker or their meaning. (GC Exh. 5, OCIJ Interpreter Handbook, pp. 11-12; JX 1(hhh), Standards Memo, pp. JX000975). The interpretation itself must be rendered in the first person as if the speaker is the one talking, and when addressing the court on their own, interpreters must speak in the third person to avoid confusing the interpreter's own speech with that of the speaker's in the written record. (GC Exh. 5, OCIJ Interpreter Handbook, p. 12; JX 1(hhh), Standards Memo, pp. JX000977-JX000978).

Interpreters must preserve the style and tone of the speaker in their renditions as well, mimicking speech patterns such as hedges, stutters, self-corrections or pauses. (GC Exh. 5, OCIJ Interpreter Handbook, p. 11; JX 1(hhh), Full and Complete Memo, p. JX000984; Tr. 125-126, 445-448). In a similar vein, interpreters must try to maintain the emotion and intent of the speakers' statements, but are not supposed to soften or enhance the force of messages conveyed or language used. (GC Exh. 5, OCIJ Interpreter Handbook, pp. 10-11; JX 1(hhh), Standards Memo, p. JX000975). In other words, as one interpreter explained:

> Well, there's a lot of nuances in the language. There's idiomatic expressions that you have to understand culturally what they mean. And, you know, being able to read the body language or, you know how someone, you know, enunciates or says certain words. It might mean something different. So you have to know all those different things.

(Tr. 126). Another interpreter echoed this same sentiment, testifying that:

> [Interpreting is] about getting the meaning across of what the person is actually trying to say . . . [W]e train by not embellishing what a person is saying, not to add more words than what a person is saying, and if we're not sure what a person is actually saying, to ask questions . . . [I]f a person makes a pause in their response, you – you say that pause. If a person stutters the date or stutters whatever he stutters, you – you have to convey that some way.

(Tr. 446-447).

When an interpreter either cannot hear or understand what a speaker has said, he or she must seek clarification from the judge before proceeding with the interpretation. (GC Exh. 5, OCIJ Interpreter Handbook, pp. 13-15). Likewise, where certain expressions can take on more than one interpretation in the foreign language, or if the interpreter is unaware of the meaning of a certain word or expression, the interpreter must inform the judge. (GC Exh. 5, OCIJ Interpreter Handbook, pp. 11-12).

Moreover, in performing their services in the Immigration Courts, interpreters generally retain the discretion to use one of two types or "modes" of interpretation—the simultaneous or consecutive mode of interpretation. (GC Exh. 5, OCIJ Interpreter Handbook, p. 1; Tr. 124-126, 437-438, 909). Simultaneous interpretation involves the concurrent interpretation of words from the foreign language to English and vice versa, and involves no regular pauses on the part of the speaker. (*Id.*) Consecutive interpretation involves a speaker's pausing at regular intervals to allow the interpreter to render his or her speech into English and vice versa aloud for everyone in the proceeding to hear. (*Id.*) Thus, unlike simultaneous interpretation, in consecutive interpretation the speaker and the interpreter take turns, and there is no overlapping speech. The Immigration Courts generally prefer that interpreters utilize the consecutive mode of interpretation, although the ultimate preference of which mode is used is left up to the presiding judge. (OCIJ Interpreter Handbook, p. 1; Tr. 438).

Occasionally, the immigration proceedings require a particular style of interpreting known as "relay interpreting." (Tr. 105, 276, 362-363, 1389). Relay interpreting is the practice of interpreting from one language to another through a third language. (*Id.*) In the Immigration Courts, relay interpreting is utilized to interpret rare indigenous languages that are spoken by limited populations in Latin America, such as the Mam language.[22] (*See* Tr. 1443). Thus, for example, when an immigrant in a proceeding speaks Mam only and is to be interpreted into English where no Mam-to-English interpreter is available, the interpretation into English will be *relayed* through two interpreters: the first interpreter will convert the speech from Mam to Spanish, and the second interpreter will then interpret the speech from Spanish into English, and

[22] As noted in the Statement of Facts, Mam is a Mayan language spoken by over 500,000 individuals in Guatemala and the need for interpreters in Immigration Courts who are proficient in Mam has spiked in recent years. (*See supra* p. 33, n. 6).

vice versa. (*Id.*, Tr. 276). Relay interpreting requires additional time and is more taxing than interpreting performed by a single interpreter. (Tr. 276).

As for protocol and demeanor, interpreters are supposed to interpret in an unobtrusive and impartial manner. (GC Exh. 5, OCIJ Interpreter Handbook, pp. 2, 11). This requires interpreters to be efficient when interpreting, be mindful of their conduct, and to avoid engaging in activities at the courts that might appear biased, such as speaking to witnesses or attorneys off the record or soliciting business from private clients while rendering services at the Immigration Courts. (*Id.* at pp. 2-3).

Interpreters must also be mindful of potential conflicts of interest, and where conflicts exist, disclose those conflicts to the judge. (*Id.* at p. 9). For instance, if a judge has a direct or indirect pecuniary interest in a home rented by a particular interpreter, then the judge may recuse herself from the proceeding to avoid a conflict of interest or the appearance of a conflict of interest. (*See* Tr. 751-752). Further, interpreters must maintain the confidentiality of the statements they interpret by not disclosing any confidential information acquired through the course of the proceeding, including information learned in non-public hearings or asylum hearings. (GC Exh. 5, OCIJ Interpreter Handbook, pp. 3, 9).

The setting in which interpreters render their services adds to the difficulty of the work as well. Interpreters must master vocabulary that is not only unique to the legal profession, but also unique to immigration proceedings more specifically. (GC Exh. 5, OCIJ Interpreter Handbook, Chapter IV: Glossary of Immigration Related Terminology (noting that interpreters should become familiar with the following immigration-related terms, “alien smuggler,” “deferred adjudication,” “quota,” and “United Nations High Commissioner for Refugees,” among others); Tr. 206-207). As just one example, if counsel objects to a question, the objections must be

interpreted. (JX 1(hhh), Standards Memo, p. JX000975). And, if an immigrant or witness has already provided a response after an objection is made, the interpreter must typically wait to interpret the response until the judge resolves the objection. (*Id.*) If the objection is overruled, the interpreter can then provide the response given. (*Id.*) If the objection is sustained, however, then interpreter generally should not provide a response unless told to do so by the judge. (*Id.*)

Finally, the proceedings take place under particularly stressful conditions because their outcome may lead to the deportation or exclusion of an individual from the United States. (GC Exh. 5, OCIJ Interpreter Handbook, p. 13; *see* Tr. 206-207). For this reason, interpreters often work under intense and emotional conditions, dealing with aliens faced with the real possibility of being permanently removed or excluded from the United States and friends or family members in the United States. (*Id.*) And for certain other aliens, such as those held in detention by the Immigration and Naturalization Service, there are additional stressors imposed because they may have recently been incarcerated or housed in a detention facility. (GC Exh. 5, OCIJ Interpreter Handbook, p. 13). This can, in turn, affect the stress level of the proceeding itself and make interpreting even more challenging and emotional. (*Id.*) Indeed, one interpreter testified in detail regarding the heightened difficulty and sensitivity of these detained cases:

> The difficulty is – well, first, it's the TeleVideo so you have to do it through a video . . . But also the case, itself, a lot of those are asylum cases, persecution; a lot of those people have been in political warfare or, you, they've been persecuted by the government for their gender, their sexuality. So there's a lot of emotion and a lot of terminology that comes up about their history. So you really have to know a lot about Latin America and the history that has happened there in order to feel comfortable and be able to do those cases . . .
>
> [T]he cases sometimes are very severe and so because it does get emotional, you know, you have some residual effects there, as well. But the terminology, as well, it could be very difficult.

(Tr. 206-207).

In sum, interpreting is a uniquely demanding profession that requires memory and analytical skills, concentration, and language mastery, among other specialized skills. (JX 1(hhh), Standards Memo, p. JX000979; Tr. 445-447). It involves much more than simply converting statements from one language to another, but instead, requires interpreters to convey the speakers' original statements as if no language barrier exists and so that the statements sound as natural as possible. (JX 1(hhh), Standards Memo, p. JX000979; *see also* Tr. 125-126, 445-447).

Court interpreting is a recognized profession much the same as a doctor or lawyer. Although an interpreter, like a doctor or lawyer, is free to practice his/her profession as an "employee" if he/she so chooses, the nature of the profession is conducive to practicing independently. Like a doctor or lawyer, an interpreter needs clients. Unlike a doctor or lawyer, an interpreter typically does not need to hire employees to assist. Nor does he/she need to lease office space or purchase expensive equipment. But the fact that an interpreter can work out of his/her home with no employee assistance does not render the interpreter any less of an independent business person than any doctor or lawyer who chooses to set up his/her own practice. In this regard, interpreters are more akin to freelance journalists or writers. A freelance journalist requires no office other than his/her home, no equipment other than a laptop computer, and no employee assistance.

The General Counsel's questioning of witnesses reflected a basic lack of understanding of the sole proprietorship form of business. A sole proprietorship is "[a] business in which one person owns all the assets, owes all the liabilities, and operates in his or her personal capacity." Black's Law Dictionary (10th ed. 2014). Thus, the fact that many (but not all) interpreters

operated their businesses in their own names is wholly consistent with the sole proprietorship form of business. The owner and the business are one and the same.

The General Counsel also questioned interpreters extensively (often with leading questions) in an effort to establish that interpreters gave "priority" to SOSi and/or attempted to fill their schedule with assignments from SOSi. The significance of this evidence seems remote. What was apparent was that interpreters gave priority to higher paying assignments over lower paying assignments. Because they had successfully negotiated above-market rates with SOSi, it is not surprising that interpreters "prioritized" assignments from SOSi. To do so makes perfect business sense. Why would any rational business person reject an assignment that will pay $225 for a half-day but probably last less than two hours to take an assignment that would pay $50 per hour with no guarantee at all (or only a two-hour minimum)? This indicates not that the interpreters are "employees," but that they are rational thinking business persons.

Similarly, that SOSi may have been the major source of revenue for some of the interpreters does not convert these interpreters into "employees" of SOSi. By way of comparison, consider the not particularly unusual situation in which a sole legal practitioner has multiple clients. Most of these clients are small, but one is a corporation that has a steady stream of business issues that require legal attention. As a result, the attorney makes sure to give priority to this particular client, who accounts for 80% of the attorney's annual revenues. The attorney is no more an "employee" of his corporate client than the interpreter who derives 80% of her annual revenues from SOSi.[23] It bears emphasis, however, that while some of the interpreters

[23] The "Pareto Principle," named for Italian economist Vilfredo Pareto, originally referred to the observation that 80% of Italy's wealth belonged to only 20% of the population. This principle has been applied in many contexts, including that 80% of a business' revenues will come from 20% of its clients.

(particularly in southern California) worked somewhat regularly on SOSi assignments, many of the interpreters on the RTW list received only sporadic assignments. And all interpreters throughout the country accepted assignments from SOSi only when they determined that it was in their best interest to do so.

Under the ICAs, interpreters are free to perform other interpreting work for entities other than SOSi, except that interpreters may not perform work for another entity under the EOIR Contract. Bejar, Estrada, Magana, Portillo, Rivadeneira, Rosas, Morris, and Espinosa all testified that while under contract with SOSi they were allowed to and did seek work from other agencies and individual clients. Interpreters advertised the work they performed for other entities while under contract with SOSi and Lionbridge on their online LinkedIn profiles and resumes. (R. Exhs. 9, 10, 13, 36; GC Exh. 296, p. 2, Resume of Hilda Estrada; GC Exh. 296, p. 9, Resume of Maria Portillo; GC Exh. 296, p. 23, Resume of Stephany Magana; GC Exh. 296, p. 31-32, Resume of Jo Ann Gutierrez Bejar; GC Exh. 296, p. 39-41, Resume of Kathleen Morris).

Bejar, for example, rendered services to the following entities while simultaneously under contract with SOSi in 2015 and 2016: (1) Esquire Deposition Solutions, LLC; (2) Tony Barriere Interpreting Service, Inc.; (3) MSC Group, Inc.; (4) Barajas Interpreting; (5) New Age Translations, Inc.; (6) Liberty Hill Foundation; and (7) De La Torre Interpreting. (R. Exhs. 1, 2). Like Bejar, Espinosa's 1099s similarly show that she performed work for other entities while simultaneously under contract with SOSi in 2015 and 2016, including (1) Peter Duong; (2) Lucile Packard Children's Hospital; (3) Access Transport Services; (4) NMC Interpreting; and (5) Pacific Interpreters Incorporated. (R. Exhs. 7, 8). Rosas also performed work for other public and private entities while under contract with SOSi, including the California Unemployment

Insurance Appeals Board, California Child Protective Services, and a private company named iInterpret. (R. Exh. 13).

Interpreters registered and maintained business licenses in their cities of residence, created business cards, and filed their tax returns as sole proprietors, using IRS Schedule C Form 1040s. (*See* R. Exh. 1, pp. 8-9 [Bejar 2015 IRS Form 1040]; R. Exh. 2, pp. 5-6 [Bejar 2016 IRS Form 1040]; R. Exh. 4, pp. 5-12 [Portillo 2015 & 2016 IRS Forms 1040]; R. Exh. 5 [Magana 2016 IRS Form 1040]; R. Exh. 6 [Magana 2015 IRS Form 1040]; R. Exh. 8, pp. 7-8 [Espinosa 2016 IRS Form 1040];R. Exh. 39 [Magana 2015 IRS Form 1040]; R. Exh. 40 [Magana City of Los Angeles Tax Registration Certificate]; *see also* Tr. 226-227, 374-375, 434-435)). On these IRS forms, interpreters deducted thousands of dollars of business-related expenses, including car expenses, miscellaneous office expenses, taxes and licenses, meals and travel expenses, continuing education classes, and cell phone and internet services, among other expenses, which is also consistent with the fact that the interpreters understood their status to be contractors of SOSi, not employees. (R. Exh. 1, pp. 8-9; R. Exh. 2, pp. 5-6; R. Exh. 5; R. Exh. 6; R. Exh. 8, pp. 7-8; R. Exh. 39).

Finally, industry practice indicates that most interpreters function as independent contractors. Indeed, in classifying the interpreters as independent contractors, SOSi followed the general industry practice, applied over the last 20 years, of drawing from a large number of independent, subcontracted interpreters to meet the contract requirements. This was not only the practice under SOSi's predecessors, but also is true throughout the interpreting field in general. In a recent national survey of professional linguists, 80% of respondents reported that they provide services under an independent contractor arrangement, and 90% of respondents felt it was important to have the option to work as an independent contractor. *See* Richard Antoine, *The*

Professional Linguist Perspective on Independent Contracting, InterpreterEd (May 10, 2017), available at http://interpretered.com/ic-study/; *see also* Employment Development Department, State of California, "Interpreters and Translators in California," California Occupational Guide, available at http://www.labormarketinfo.edd.ca.gov/OccGuides/Detail.aspx?Soccode=273091&Geography=0601000000 (stating that "[m]any Translators and Interpreters work as independent contractors, either directly for their clients or through language service agencies.").

In summary, the independent business nature of interpreting, the skill and training required, and industry practice all weigh heavily in favor of independent contractor status.

6. Method of Payment And Entrepreneurial Opportunities Favor Independent Contractor Status.

The method of payment heavily favors independent contractor status because it is the direct product of bilateral negotiations between the parties. In the beginning, the interpreters held a dominant bargaining position by virtue of SOSi's dire need to obtain interpreters and the fact that the interpreters had banded together as a unified group. Because southern California was a critical area for SOSi and because the interpreters in the area were the most united, the negotiations between SOSi and this group of interpreters set the stage for the negotiations that would occur elsewhere. SOSi had offered an hourly rate that the interpreters deemed to be disrespectfully low. Although there was no precedent for half-day and full-day rates at Lionbridge, the interpreters decided that such rates would be the model upon which they would insist. From the point of view of the interpreters, such rates provided a level of security they never previously enjoyed. It also provided the opportunity to work less and earn more. As the record reflects, the overwhelming majority of morning and afternoon assignments end long before noon or 5:00 p.m. Frequently, a morning or afternoon case would end in 60 to 90 minutes.

Occasionally, the court would send the interpreter to another assignment, but more often the interpreter would be released and free to leave and to engage in whatever personal activities he or she might wish. Even when sent by the court to a second case, the interpreter more often than not would be released by the court well before the end of the half day or full day. As a result, the interpreters enjoyed a lifestyle that permitted them considerable freedom as well as an income that, if calculated on an hourly basis, was high relative to the prevailing wage rate for interpreters nationwide.[24] (*See* Tr. 45, 179, 468, 1319, 1372-1373). During her time with SOSi, Morris worked hearings lasting 318 hours and was paid a total of $26,550, an average hourly rate of $83.75. (GC Exh. 221). Rivadeneira worked hearings lasting just under 617 hours and was paid a total of $54,314, an average hourly rate of $88.03. (GC Exh. 142). Rosas worked hearings lasting 648 hours and was paid a total of $60,416, an average hourly rate of $93.23. (GC Exh. 164). Espinosa worked hearings lasting just under 150 hours and was paid a total of $15,212, an average hourly rate of $100.74. (GC Exh. 97). Estrada worked hearings lasting just under 404 hours and was paid a total of $45,028, an average hourly rate of $111.45. (GC Exh. 115). Bejar worked hearings lasting just under 151 hours and was paid a total of $18,127, an average hourly rate of $120.04. (GC Exh. 8). Magana worked hearings lasting just under 367 hours and was paid a total of $48,097, an average hourly rate of $131.05. (GC Exh. 82). Portillo worked hearings

[24] Indeed, interpreters confirmed that SOSi's high rates of pay were one of the key reasons that they "prioritized" assignments received from SOSi. (Tr. 45, 179, 468; *see also U.S. immigration interpreters under siege again*, The Professional Interpreter (Aug. 23, 2016), available at https://rpstranslations.wordpress.com/2016/08/23/u-s-immigration-interpreters-under-siege-again/ ("The [labor] movement became quite strong and . . . SOSi was left with no choice but to offer contracts to many of the more experienced interpreters under work conditions similar to the ones they were used to with the former contractor, and in many cases with the interpreters getting better fees than before.") (emphasis added).).

lasting just under 369 hours and was paid a total of $49,606, an average hourly rate of $134.43. (GC Exh. 49).

As noted, the southern California negotiations set the stage for negotiations elsewhere and the half-day/full-date rate structure became the norm. By the summer of 2016, however, the dynamics had changed to some degree. SOSi was losing money hand over fist on the EOIR Contract. Because it was in no position at that time to renegotiate its contract with the DOJ[25], SOSi knew that it had to take steps to renegotiate its contracts with the interpreters. This resulted in an RFQ process in which SOSi sought to establish maximum hourly rates for Spanish, common, and uncommon languages. Needless to say, SOSi's efforts were not well received by the interpreters, and many refused to agree to such rates, and thereafter continued to work on extensions of their original terms, including their half day and full day rates.

The General Counsel's questioning of witnesses suggests that it is his contention that the interpreters lacked any meaningful entrepreneurial opportunity because if they had a morning assignment they could never be certain they would be released in time to take an afternoon assignment elsewhere and if they had an afternoon assignment for SOSi they could not risk taking a morning assignment elsewhere because that assignment might not end in time to be able to make the afternoon assignment. This argument is more theoretical than real. Any risk in taking a SOSi assignment and a non-SOSi assignment on the same day was minimal and manageable. As the record reflects, assignments rarely ran their full length. Thus, the likelihood that an interpreter would have a morning assignment for SOSi and not be able to make an afternoon

[25] Initially, the DOJ was not interested in renegotiating the terms of the EOIR Contract with SOSi. However, on July 10, 2017, SOSi was able to successfully execute a modification with the DOJ, effective September 1, 2017, which altered the terms of the EOIR Contract to address SOSi's ongoing monetary losses and hardship. (JX 1(f), p. JX000225).

assignment elsewhere was remote. But if it did occur, there is no obvious reason why the interpreter could not notify the parties involved in the afternoon assignment that he/she had been held over and would be late. Most non-SOSi assignments for interpreters involved private parties such as attorneys, businesses, and schools, rather than courts. A deposition may be scheduled for 2:00 p.m., but any experienced attorney knows that the scheduled start time may be altered for any number of reasons. Opposing counsel may be running late from a morning court hearing. The deponent or the court reporter may be sick or may have experienced a personal emergency. The same is true for other private assignments. Outside the court system itself, the legal and business world do not function on rigid timetables that cannot be altered. Of course, any person who makes a habit of being late may develop a reputation that adversely affects their future opportunities, but in this day and age, juggling meetings and appointments is the rule, not the exception. The fact is that there is no reason why a motivated interpreter could not take multiple assignments on a daily basis. As for taking a non-SOSi morning assignment and a SOSi afternoon assignment, any risk was still manageable. The interpreter would need to make sure that the morning assignment ended in time for her to make a 1:00 p.m. hearing in immigration court. This might mean that the interpreter could only take a shorter morning assignment or that the assignment would need to start at 9:00 a.m. rather than 10:00 a.m. But the opportunity still existed.

Moreover, the interpreter was completely in control of his/her schedule by virtue of the freedom to accept or decline any offered assignment. The freedom to decide between, for instance, accepting a half-day assignment from SOSi or rejecting it and accepting an assignment from another client that might pay more or might be for a greater number of hours is the essence of what it means to be an entrepreneur. An interpreter's decision to accept one assignment over

another on any given day simply represents an opportunity cost and is not indicative of employee status. Indeed, the record is clear that interpreters decide if, when, and how many assignments they will perform for SOSi in any given day, month, or year. In doing so, the interpreters control how much, or how little, money they will earn by working for SOSi, and how much, or how little, money they will make from other clients. This clearly constitutes entrepreneurial opportunity.

The General Counsel also appears to contend that because the half-day and full-day rates were the same whether the hearing lasted 30 minutes or 4 hours, and because there was no additional pay if the interpreter worked more than one case in the morning or afternoon, the interpreter had no ability to increase his or her pay. But time is money, and the half-day/full-day structure provided the interpreters with a degree of flexibility that is not available in a normal employment relationship. The interpreters were effectively paid by the "job." They received $225 for a half-day job, whether that job took 30 minutes to complete or 4 hours. A full-day job was in essence two half-day jobs that were independent of each other. The interpreter was paid $225 for the morning job and $200 for the afternoon job. Again, the pay was not linked to how long each job lasted. While an interpreter may not have been able to increase his or her pay from SOSi above $425 in a given day, time has an inherent value that cannot be measured strictly in dollars, and the half-day/full-day structure provided a high level of guaranteed compensation with a minimum expenditure in time. Further, the interpreters were the ones who desired and negotiated for this rate structure in the first place. Therefore, to the extent that any specific interpreter felt constrained in his/her ability to make more money from other clients because deciding to work a half-day assignment for SOSi prevented him/her from accepting another assignment, that constraint is not attributable to SOSi.

The General Counsel presumably will argue that SOSi effectively terminated the half-day/full-day structure and forced interpreters into an hourly pay arrangement beginning in September 2016. It is true that SOSi sought to reduce its costs by converting the interpreters into an hourly-based pay structure. But it was only partially successful in doing so, and its success or failure turned on the outcome of direct negotiations with individual interpreters. Beginning in September 2016, SOSi finally was in a position to contract with newly qualified interpreters who had not previously worked for Lionbridge. This created a level of competition that had not existed before, and it increased, at least to some degree, SOSi's bargaining power, as SOSi was no longer completely dependent upon former Lionbridge interpreters. Of course, this change in respective bargaining power did not occur over night, and the record reflects that the vast majority of former Lionbridge interpreters continued to work at the Immigration Courts on their original half-day/full-day rate structures. On the other hand, brand new interpreters generally agreed to hourly rate structures with certain minimum guarantees. SOSi also began offering incentives in order to entice interpreters on a half-day/full-day rate structure to convert to an hourly structure. These incentives were successful to some degree, and some interpreters agreed to the change. But in every case, whatever occurred was the product of individual negotiation. As the record reflects, the rate structure varies greatly from interpreter to interpreter, and each interpreter is free to negotiate. Negotiation, however, seldom means that one gets exactly what one wants. The overriding point is that each interpreter was free to decide for himself or herself what terms he/she would accept or not, and he/she remained free at all times to accept or reject assignments offered by SOSi. The method of pay and entrepreneurial opportunity weigh in favor of independent contractor status.

7. Tools, Equipment, and Place of Work Favor Independent Contractor Status.

SOSi provides no tools or equipment to the interpreters. All tools and equipment are furnished either by the interpreters or by the courts. Moreover, the interpreters do not perform their work at SOSi's operational headquarters in Reston, Virginia. This is where all of the regional coordinators work. None of the interpreters have any occasion to come to SOSi headquarters, and they never meet their regional coordinators in person. All communication is by email, phone, and text messaging. The interpreters operate their businesses out of their homes, although the Los Angeles interpreters did rent an office across from the courthouse that they could use. The interpreters' work on SOSi assignments is performed exclusively at the EOIR courts. SOSi has no ownership interest in or right to control the courthouses, and it has no physical presence at these courthouses. This factor heavily favors independent contractor status.

8. The Length of Employment Is Neutral.

The interpreters are primarily on one-year contracts, coinciding with the optional one-year terms under the EOIR Contract, although some are operating on a series of extensions of their original agreements. Some interpreters work at the EOIR courts on a fairly regular basis, while others work very sporadically. Importantly, no interpreter is guaranteed any certain volume of work or assignments. This factor seems largely uninformative one way or the other.

9. SOSi's Business Slightly Favors Independent Contractor Status, Or Is Neutral.

SOSi is a government contractor. With respect to the EOIR Contract, its business is to provide interpreters to fill the demands of the Immigration Courts. SOSi does not operate, or have any financial interest in, the EOIR courts. Instead, it functions primarily as an intermediary between the EOIR courts and the interpreters. The interpreters are, of course, essential to SOSi in the sense that without them SOSi could not fulfill its contract with DOJ, but their services are

really for the benefit of the Immigration Courts. "The relevant inquiry is 'whether or not the work is part of the regular business of the employer,' Restatement (Second) of Agency § 220(2)(h), not whether the work is essential to the business of [the employer.]" *Crew One Productions, supra*, 811 F.3d at 1313-1314 (finding that stagehands and company that referred stagehands were not engaged in the same business). The relevance of this particular factor is "obscure" and its significance has been questioned. *Minnesota Timberwolves Basketball, LP*, 365 NLRB No. 124, n. 48 (2017). Respondent contends that to the extent it has any bearing at all, this factor tilts somewhat in favor of independent contractor status. However, this factor seems so insignificant in this case as to be essentially meaningless.

10. Summary

In summary, the vast majority of the pertinent factors, particularly the two most important factors (mutual intent and right to control) overwhelmingly support a finding that the interpreters are independent contractors excluded from the Act's coverage. Two recent Board decisions warrant specific discussion, as they are likely to be relied upon by the General Counsel. In *Pennsylvania Interscholastic Athletic Assoc.*, 365 NLRB No. 107 (2017) ("*PIAA*"), a Board majority found that high school lacrosse officials were statutory employees rather than independent contractors. In *Minnesota Timberwolves Basketball, L.P.*, 365 NLRB No. 124 (2017) ("*Minnesota Timberwolves*"), the same Board majority found that crewmembers who produced video content for the center scoreboard of a professional (NBA) basketball team were statutory employees rather than independent contractors. Both decisions provoked dissents by former Chairman Miscimarra, suggesting that the decisions may be overruled by the new Board. In any event, *PIAA* and *Minnesota Timberwolves* are both distinguishable on their facts. Thus, even under the Board's precedents as they currently exist, rather than how they are projected to

be, the interpreters are independent contractors. In the paragraphs that follow, Respondent discusses these decisions to point out significant differences between both cases and the current case.

A critical distinction here is that all of the regulation and control to which the interpreters are subject is either directly or indirectly imposed by the federal government. Thus, to the extent that there is on-site "supervision" of the interpreters, that "supervision" is exercised by EOIR staff and employees. The court schedules and starting and stopping time are set by EOIR. Court rules and policies are set by EOIR. Disqualifications are determined by LSU. Courthouse security protocols are determined by EOIR. As discussed earlier, the Board has held that government regulation and control will not be considered in determining whether an individual is an employee or an independent contractor. *Don Bass Trucking, Inc.*, 275 NLRB 1172, 1174 (1985). The Board's decision in *Air Transit, Inc.*, 271 NLRB 1108 (1984) is particularly significant because the controls in that case, like those in this case, arose out of the employer's service contract with a federal agency. Although the agency contract imposed extensive restrictions and regulations on the drivers and the employer, the Board declined to consider these regulations and restrictions and found the cab drivers to be independent contractors.

The Seventh Circuit's decision in *EEOC v. North Knox School Corp.*, 154 F.3d 744, 747-751 (7th Cir. 1998) is also instructive as it extensively discusses the concept of government imposed controls. In that case, the court addressed the EEOC's contention that a school corporation created by the state violated the ADEA by terminating two school bus drivers with whom the school corporation had entered into transportation contracts. The determinative issue concerned whether the drivers were employees or independent contractors. In contending that they were employees, the EEOC relied almost exclusively upon controls required by state law or

regulation. The court rejected the EEOC's contention:

> As other examples of North Knox's "control" and "supervision," the EEOC cites to the detailed specifications in the transportation contracts, which set "the precise route and schedule of each driver." And the EEOC contends that North Knox "controls" the drivers because it "limits the number of times and permissible reasons a regular driver may be absent, requiring him to obtain a substitute driver from a list approved by the Board." Also North Knox requires the drivers to enforce its disciplinary policies but "restricts the disciplinary tools available to bus drivers and retains the ultimate authority to sanction pupil misconduct. The drivers are not free to set their own rules for appropriate behavior, and have little discretion to select or administer punishment." Surely the EEOC would not expect each driver under contract to have his or her own standards for discipline and punishment in order to be labeled independent. Again North Knox correctly responds that each of these "controls" is dictated by statute, so to that extent what we have said about the other state regulations applies with equal force. But we see a deeper flaw in the EEOC's argument. Certainly one can "control" the conduct of another contracting party by setting out in detail his obligations; this is nothing more than the freedom of contract. This sort of one-time "control" is significantly different than the discretionary control an employer daily exercises over its employees' conduct.

Id. at 748.

The Seventh Circuit's decision also highlights another flaw in the General Counsel's contentions regarding control. In particular, if the controls imposed on interpreters by virtue of SOSi's government contract are sufficient to create an employment relationship between SOSi and the interpreters, these controls are equally sufficient to establish an employment relationship between the EOIR and the interpreters. Thus, the court observed: "If extensive state regulation does not make one an employee of the state, these same regulations certainly would not impose employer status on a school corporation that must follow such regulations." *Id.* Although not explicitly stated by the court, it would seem that if a government contract's provisions make the contractor an "employer" of interpreters retained to provide services to the government, these provisions likewise make the interpreters employees of the government. This conclusion, of

course, would have serious consequences.

Neither *PIAA* nor *Minnesota Timberwolves* involved an employer whose ostensible control was a result of its service contract with the United States. Rather, the controls came directly from the employer. For example, in *PIAA*, 365 NLRB No. 107, slip op. at 3-4, the Board majority found:

> PIAA has far-reaching control over the means and manner of the officials' work through its comprehensive rules. Of particular note, PIAA's constitution broadly empowers its board of directors to determine, inter alia, "the method of and the qualifications for the registration of officials; to determine their powers and duties; and to make and apply necessary policies, procedures, rules, and regulations for such officials." Acting in accordance with that authority, PIAA selects officials for their positions after applicants complete a background check and achieve the required proficiency on a PIAA-administered examination. Then, officials must attend PIAA chapter meetings and annual training to remain eligible to officiate. On the job, the board of directors maintains a variety of work rules, including rules that specifically control the officials' job performance. Moreover, although officials are not directly supervised during games (insofar as no one from PIAA is physically present to watch them officiate), there are mechanisms in place by which the officials are held accountable to PIAA for their on-field performance and which may result in discipline.

In *Minnesota Timberwolves*, 365 NLRB No. 124, slip op. at 4, the Board majority found:

> [I]t is clear from the record that the [crew member] director receives significant input from the [employer director] for each and every game, both in meeting with the [employer director] before the game to review the [employer director's] rundown and in implementing the [employer director's] rundown and live calls while the game is in progress. The [employer director] is present at all games to provide the crewmembers with an array of game-day instructions for producing and displaying content on the center-hung board. The [employer director's] instructions are unique to each game depending on what mascot skits or special programming the Employer has planned, what sponsorships the Employer wants to display, or what other specific items the Employer decides the crew needs to produce and display on the board during any given game. During pregame rehearsals, camera operators may receive specific instructions from the [employer director] on what footage to capture and how to capture it. For example, the [employer director] may direct camera operators to use a specific camera angle to record a skit

> involving Crunch. Once the game starts, the crew follows the [employer director's] rundown and any live calls received from him. . . .

The control that the Board majority found dispositive in *PIAA* and *Minnesota Timberwolves* was directly initiated and carried out by the employer and solely for its own benefit. None of this control emanated from government regulations or a government contract. Here, in contrast, substantially all of the alleged "control" is government initiated and/or mandated, and the interpreters' services were for the government's benefit.

Also lacking in *PIAA* and *Minnesota Timberwolves* was any evidence of *mutual* intent to create an independent contractor relationship. In *PIAA*, the only evidence of intent was from the terms of the written agreement, but these terms were "unilaterally created and imposed by PIAA, which diminishes the weight to be given them." 365 NLRB No. 107, slip op. at 3. In *Minnesota Timberwolves*, the record lacked any meaningful evidence regarding intent, and neither party argued otherwise. 365 NLRB No. 124, slip op. at 12. Thus, this factor was inconclusive. Here, however, the evidence of mutual intent is overwhelming as the terms of the ICAs were mutually negotiated and all parties expressed a desire to establish an independent contractor relationship.

The record overwhelmingly leads to the conclusion that the interpreters are independent contractors rather than statutory employees. Because the entire complaint is premised upon the proposition that the interpreters are statutory employees, Respondent requests that the complaint be dismissed in its entirety.

B. SOSi Shares The Government's Exemption.

Respondent has raised an affirmative defense that if the interpreters are found to be employees of SOSi, the United States is a joint employer of these interpreters and Respondent shares the government's exemption. Of course, if the ALJ agrees with Respondent that the interpreters are independent contractors, this affirmative defense need not be addressed.

Although Respondent is not itself a government entity, EOIR indisputably is an exempt government agency. Thus, the question arises as to whether, given the close relationship between SOSi and EOIR, the Board should find either that SOSi shares EOIR's exemption under § 2(2) of the Act or even if SOSi is not itself exempt, the Board should exercise its discretion to withhold jurisdiction. Historically, the Board has applied a variety of tests to answer this question. In *Ohio Inns, Inc.*, 205 NLRB 528, 528-529 (1973), the Board declined to exercise jurisdiction over a lodge that operated under a contract with the Ohio Department of Natural Resources. The Board found that the Ohio agency had such control over the lodge that they were joint employers and that "it would not effectuate the policies of the Act to assert jurisdiction over a private employer because the state is a joint employer." *Ohio Inns,* 205 NLRB at 529. In *National Transportation Service,* 240 NLRB 565, 565-566 (1979), the Board, without overruling the *Ohio Inns* joint employer test, applied a more relaxed standard, and held that it would decline to exercise jurisdiction if the employer, because of its relationship with an exempt entity, lacked sufficient control over terms of employment to engage in "effective" or "meaningful" collective bargaining. Subsequently, in *Res-Care, Inc.*, 280 NLRB 670, 672 (1986), the Board reaffirmed *National Transportation,* but clarified that it would "examine closely not only the control over essential terms and conditions of employment retained by the employer, but also the scope and degree of control exercised by the exempt entity over the employer's labor relations, to determine whether the employer in issue is capable of engaging in meaningful collective bargaining."

In *Management Training Corp.*, 317 NLRB 1355, 1355 (1995), the Board found that the *Res Care* standard was "unworkable and unrealistic," *Id.*, and that henceforth, it would "only consider whether the employer meets the definition of 'employer' under Section 2(2) of the Act,

and whether such employer meets the applicable monetary jurisdictional standards." *Id.* at 1358. Although the *Res-Care* decision was not premised on any showing that the employer and the exempt entity were "joint employers" and there was no need for the Board to address the *Ohio Inns* joint employer question, the Board dropped a footnote in which it stated that it would "continue to find, as in *Res-Care*, 280 NLRB at 673 n. 12 and n. 14, that we will not employ a joint employer analysis to determine jurisdiction." 317 NLRB at n. 16. This, statement, however, was a misinterpretation of what the *Res-Care* Board held. In footnote 12, the *Res-Care* Board, referencing a prior Board decision in *ARA Services*, 221 NLRB 64, n.7 and 65, n. 11 (1975), stated: "Although the Board there concluded that the employer shared the statutory exemption of the county because the county was a joint employer of the employer's employees, we do not rely on the Board's joint employer analysis. *We do not require a finding* that the exempt entity is a joint employer in order to withhold the assertion of jurisdiction." (Emphasis supplied). The *Res-Care* Board clearly was not *rejecting* the proposition that a finding of a joint employer relationship between an employer and an exempt entity would warrant the Board in withholding jurisdiction over the employer. What it was saying was that such a finding was not *required* to withhold jurisdiction. The *Res-Care* Board established a separate *lower* standard for withholding jurisdiction than the *Ohio Inns/ARA Services* joint employer test. When the *Management Training* Board overruled *Res-Care*, there was no need for it to address the more rigorous joint employer standard because no one was contending that the record was sufficient to find joint employer status. Thus, in stating that it was overruling *Ohio Inns*, the *Management Training* Board decided an issue that was not really before it and it did so on the basis of a misreading of *Res-Care*.

Respondent recognizes that *Management Training* precludes any finding by the ALJ that SOSi shares EOIR's exemption under either an *Ohio Inns* joint employer analysis or a *Res-Care* lack of control standard. However, Respondent intends, if necessary, to bring this issue back before the Board. Respondent contends that if the record is sufficient to establish that the interpreters are employees of SOSi, it certainly is sufficient to establish that EOIR is a joint employer of the interpreters. As the EOIR is an arm of the United States and exempt from the Act's coverage, Respondent shares that exemption. Alternatively, it would not effectuate the purposes of the Act for the Board to exercise jurisdiction over SOSi.

C. Misclassification Of Employees As Independent Contractors Does Not Violate The Act.

Because the interpreters are in fact and law independent contractors, rather than statutory employees, the General Counsel's misclassification allegation fails. In the event, however, it should be determined that the interpreters are statutory employees, Respondent contends that simply "misclassifying" employees as independent contractors does not violate the Act. This is particularly true where, as is the case here, the parties negotiated their status and mutually agreed that they were properly classified as independent contractors. Respondent is unaware of any reported Board decision that directly addresses whether the mere misclassification of employees as independent contractors violates the Act. In *Menard, Inc.*, Case No. 18-CA-181821, 2017 WL 1407275, at *1 (NLRB Order, April 19, 2017), this issue was presented to the Board in the employer's motion for summary judgment. The Board, however, denied the motion "without prejudice to the Respondent's right to renew these arguments to the administrative law judge and raise them before the Board on any exceptions that may be filed to the judge's decision, if appropriate." Thus, the issue is an open one.

The Board should not be in the business of rewriting arms-length contracts voluntarily entered into by parties. A contract that characterizes a relationship as that of an "independent contractor" is not, on its face, unlawful. Even if the Board finds that certain individuals are statutory employees under the Act, that finding is not binding under any other statute or legal setting. An individual may be an independent contractor under one statute and an employee under a different statute. The label itself is not determinative. If there is a provision in the agreement that violates the Act as applied to statutory employees, the Board may enter an order addressing that specific provision. But the mere fact that the parties' contract provides that an individual is an independent contractor does not violate the Act. Respondent requests that this allegation be dismissed.

D. SOSi Did Not Unlawfully Rescind/Refuse to Renew Contracts.

For the reasons discussed, *supra*, the interpreters are independent contractors not covered by the Act. Program management determined that Estrada, Magana, Gutierrez-Bejar, Rivadeneira, Portillo, and Morris were acting against SOSi's interests and undermining SOSi's ability to perform on the EOIR Contract. As independent contractors, their activities were unprotected, and SOSi lawfully decided not to renew their contracts.

Espinosa and Rosas also were independent contractors and thus excluded from the Act's coverage. However, their circumstances are unique and present different questions, assuming, *arguendo*, that they were statutory employees. Rosas was in fact offered a new contract, but she effectively cut off negotiations with SOSi by taking a take-it-or leave-it position regarding the terms of a new contract. (GC Exh. 187). The General Counsel's contention that SOSi discriminatorily switched her cases and constructively terminated her is not borne out by the record. On August 25 and 26, 2016, a substantial number of interpreters in Los Angeles suddenly

and unexpectedly cancelled their case assignments for these days, and some participated in a public protest against DOJ, the EOIR, and SOSi. (Tr. 832, 1459-1460). Rosas was one of many interpreters who participated in this protest, though she was not scheduled to work assignments at the Immigration Courts on those dates. (*Id.*) Because many interpreters unexpectedly cancelled their assignments on these days, SOSi took steps to ensure that its Los Angeles cases were sufficiently covered during these days and the subsequent week. (Tr. 1460). In the past, Rosas had accepted assignments in Los Angeles, as well as in Adelanto for her local rate of pay. (GC Exhs. 166, 176). And in fact, between April and August 2016, Rosas had accepted over 20 cases in Los Angeles at her local rate of pay. (*Id.*) Because Rosas had previously accepted Los Angeles cases at her local rate, Siddiqi decided to switch Rosas's cases for Adelanto to a local interpreter, and asked Rosas to take substitute cases in Los Angeles. (Tr. 1460-1461). Upon being so notified on August 26, 2016, Rosas responded that she would only accept the Los Angeles cases if they were full-day assignments and only for a higher pay rate of $550. (*Id.*). Siddiqi responded on August 27, noting that Rosas previously had covered half-day cases in Los Angeles for $225, but in light of her position, he would only offer her cases in Adelanto. (GC Exh. 174). While this may have reduced to some degree Rosas's opportunities, it was purely by her own choice, and she nevertheless was offered, and confirmed at least 20 regular cases for September. (Tr. 843, 1462).

On September 12, 2016, Rosas received a Request for Quotation ("RFQ") email from SOSi, containing a renewed, proposed ICA and inviting her to submit a quote. (GC Exhs. 183, 184). On September 19, 2016, Rosas advised SOSi that she was rejecting SOSi's terms for submitting a quote and would not accept the proposed ICA. (GC Exh. 187). On September 27, 2016, SOSi emailed Rosas, stating that it could not accept her proposed counteroffer. (GC Exh.

188). Rosas did not respond or submit any additional proposals after SOSi rejected her counteroffer. (Tr. 858). Therefore, Rosas voluntarily ended her working relationship with SOSi in late September 2016. (Tr. 879). Respondent requests that the allegation regarding Irma Rosas be dismissed.

As for Espinosa, she was requested to make a proposal for a new contract, which she did at her half-day/full-day rates. In the midst of this process, however, SOSi learned that Espinosa was one of a number of interpreters who inappropriately shared a faulty link contained in the RFQ that contained personal information related to other interpreters (including Maria Elena Walker), rather than Espinosa's personal contract documents. During the course of SOSi's investigation, Espinosa provided changing accounts of what had happened. Jessica Hatchette, however, concluded, based on her investigation, that Espinosa was not telling the truth and that she had repeatedly shared another interpreter's personal information with other persons. Espinosa admitted that when Hatchette first asked Espinosa whether she had shared this link with other interpreters she denied doing so and then later changed her response and admitted to Hatchette that she shared the link with two other individuals, one of whom was an interpreter and one of whom was a friend. (Tr. 555-556). For all of these reasons, her ICA was terminated.

Even assuming, *arguendo,* that Espinosa was an employee, employees have no statutory right to access or share private personal data of another employee that they know was inadvertently breached. This is true even if the employees' initial exposure to the confidential personal data was innocent. Thus, in *IBM Corp.*, 265 NLRB 638, 638 (1982), the Board upheld the discharge of an employee for disclosing wage data that he knew was deemed confidential and that he was not authorized to disclose, even though the information was sent to him anonymously. *See also Cook County College Teachers Union*, 331 NLRB 118, 118, 122 (2000)

(employer lawfully disciplined secretary for disclosing confidential directory); *Grocery Carts, Inc.*, 264 NLRB 1067, 1067, 1070-71 (1982) (employee lawfully discharged for examining document in manager's desk containing confidential information regarding another employee). Respondent requests that the allegations regarding Rosario Espinosa be dismissed.

E. The Confidentiality Agreement, Code of Professional Responsibility, Publicity Clause, and SOSi Code of Business Ethics & Conduct Are Lawful Under Section 8(a)(1) of the Act

Paragraphs 15 to 18 of the Consolidated Complaint allege that the Confidentiality Agreement, Canon 6 of the Code of Professional Responsibility, the Publicity Clause in the ICAs, and certain sections of SOSi's Code of Business Ethics and Conduct are unlawful under Section 8(a)(1) of the Act. These allegations are without merit. Indeed, because the interpreters are independent contractors, the Act's provisions do not apply. However, assuming, *arguendo*, that they are statutory employees, these policies still do not violate the Act.

On December 14, 2017, the Board issued its decision in *The Boeing Co.*, 365 NLRB No. 154, slip op. at 3-4 (2017), establishing a new standard for assessing the legality of workplace rules, policies, and other provisions under the Act. The Board's decision overturned *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which had held that a workplace rule that did not explicitly restrict employee rights would nevertheless be found unlawful if employees would "reasonably construe" it that way. *Boeing*, slip op. at 2. Under the new standard, the Board explained that it would no longer focus exclusively on whether employees would "reasonably construe" a rule to restrict Section 7 rights to determine if a rule is unlawful. *Boeing*, slip op. at 3, 14. Instead, when reviewing a facially neutral rule that, when reasonably read would possibly interfere with Section 7 rights, the Board will weigh the: (1) "nature and extent" of the potential impact on those rights; and (2) the legitimate justifications associated with the rule. *Id.*

The inquiry under *Boeing* requires a two-step analysis. *Id.*, slip op. at 17. First, the Board must determine whether a facially neutral rule, when reasonably read, would potentially interfere with an employee's Section 7 rights. And second, if it does, then the Board must consider the: (1) "nature and extent" of the potential impact on those rights; and (2) the legitimate justifications associated with the rule. If, on balance, the legitimate justifications outweigh a rule's impact on protected rights, the rule will be found to be valid. *Boeing*, slip op. at 3, 5. In addition, in *Boeing*, the Board found it "appropriate to apply the standard . . . retroactively [to Boeing] and to all other pending cases." *Id.*, slip op. at 17. Accordingly, the Board's new *Boeing* standard controls here.

1. Confidentiality Agreement

As noted earlier, the General Counsel has advised that the Region will be requesting to withdraw the allegation regarding the confidentiality policy. This is clearly appropriate and required under *Boeing.* The Confidentiality Agreement provision at issue in the Consolidated Complaint is Section II.B, which states: "Except as necessary in the performance of my duties under this contract, I will not: Disseminate any oral or written information obtained as a result of execution of this contract or performance of work hereunder." (GC Exh. 5, Confidentiality Agreement, p. 1). The opening paragraph of the Confidentiality Agreement clarifies that the purpose of the Confidentiality Agreement is to limit interpreters from disclosing information acquired by or available to them while performing services at the Immigration Courts:

> I. I, _____, do solemnly swear (or affirm) that *I understand the high standards of trustworthiness and integrity required of me with regard to materials and information which may come to my attention in connection with Government Contract DJJ15-C-XXXX* . . .
>
> II. Except as necessary in the performance of my duties *under this contract*: I will not:

A. Reveal, divulge, or publicize any matters dealt with *under this contract*.

B. Disseminate any oral or written information obtained as a result of execution of *this contract or performance of work hereunder*.

C. Remove any document *from the place of performance of this contract*, except as approved in advance by the Contracting Officer's Technical Representative.

(*Id.* (emphasis added)). Thus, when Section II.B is read in context with the other provisions in the Confidentiality Agreement, no reasonable person would read it as prohibiting Section 7 activity. Rather, a reasonable interpreter would understand the above language as preventing the disclosure of confidential information and Immigration Court-specific documents acquired by or available to an interpreter while in the courthouse performing services "in connection with Government Contract DJJ15-C-XXXX," i.e., the EOIR Contract. This understanding is also consistent with an interpreter's more general understanding of the duty of confidentiality in the interpreting profession, which requires an interpreter to keep confidential information acquired in a legal proceeding. (*See* Tr. 444-445).

Even assuming, however, that an interpreter would reasonably view Section II.B as impermissibly limiting Section 7 rights, Respondent has a substantial and legitimate business interest in preventing the disclosure of confidential information acquired by an interpreter in a legal proceeding. This Confidentiality Agreement is dictated by Section H.4 of SOSi's EOIR Contract, which mandates that all EOIR interpreters sign a confidentiality agreement agreeing not to disclose any "data to which access may be gained throughout contract performance," which includes "any information about the cases or investigations the Contractor is working on, including the names and subject matters of the cases or investigations." (JX 1(a) ¶ H.4, JX 1(f) ¶ H.4). In contrast, the possible adverse impact of the Confidentiality Agreement on protected

activity is comparatively slight. Under these circumstances, Respondent has not violated Section 8(a)(1) by maintaining the Confidentiality Agreement.

Respondent requests that this allegation be dismissed.

2. Code of Professional Responsibility

The General Counsel also has advised that the Region will be requesting to withdraw the allegation regarding the confidentiality policy. This is clearly appropriate and required under *Boeing.* Canon 6 of the Code of Professional Responsibility provides: "Interpreters shall not publicly discuss, report, or offer an opinion concerning a matter in which they are or have been engaged, even when that information is not privileged or required by law to be confidential." (GC Exh. 5, Code of Professional Responsibility, p. 2). This Canon cannot reasonably be viewed as interfering with Section 7 activity, as it only limits interpreter communications "concerning a matter in which they [interpreters] are or have been engaged." The use of the phrase "concerning a matter in which they are or have been engaged" makes plain that discussion regarding Section 7 activity is not prohibited.

But even if such an interpretation were reasonable, SOSi has a substantial and legitimate business interest that outweighs any limited impact on Section 7 activity. Section C.3.11 of the EOIR Contract expressly requires that Respondent supply interpreters the exact Code of Professional Responsibility at issue in the case:

> The Contractor shall reproduce and distribute to its interpreters, at the Contractor's expense, the Code of Professional Responsibility Statement (Attachment (6)). The Contractor shall ensure all of its interpreters read and sign the Code of Professional Responsibility Statement.

(JX 1(a) ¶ C.3.11; JX 1(f) ¶ C.3.11). Respondent has not violated Section 8(a)(1) by its maintenance of Canon 6.

3. ICA Publicity Clause

Paragraph 12 of the ICA states:

> **12. PUBLICITY**
>
> No news release or other public announcement shall be made about this Agreement without the prior written consent of SOSi. Contractor shall direct to SOSi (without further response) any media inquiries concerning SOSi, this Agreement, or the Contractor's Work for, or engagement by SOSi.

(JX 1(j)). Although the language in the Publicity Clause is somewhat broader than Canon 6 or the Confidentiality Agreement, as it purports to limit what may be said about an interpreter's ICA, when Paragraph 12 is read in full, a reasonable interpreter would not understand the provision as limiting Section 7 rights. Rather, an interpreter would view the clause as limiting his or her ability to issue *public* statements (e.g., press conference) about the provision of interpreting services to the Immigration Courts. The language is clear that no "news release" or "other public announcement shall be made," but nothing is said of private conversations among fellow colleagues concerning activity that is protected by Section 7. Insofar as this provision may reasonably be construed to restrict Section 7 rights, such limited impact is outweighed by SOSi's legitimate business interests in precluding any public statements that might adversely impact SOSi's contract and relationship with EOIR. Respondent requests that this allegation be dismissed.

4. Code of Business Ethics and Conduct

Finally, the General Counsel argues that Respondent's Code of Business Ethics and Conduct violates Section 8(a)(1). The Code is a document that SOSi utilized as an attachment in its newly executed ICAs until approximately January 2016. (Tr. 1303-1306, 1313; GC Exh. 45). After January 2016, SOSi ceased providing it to interpreters because the company determined

that its use was only required for large subcontractors whose subcontracts were valued well in excess of each interpreter's ICA. (Tr. 1303-1306). For the subset of ICAs that contain it, the Code provides, in relevant part:

> ***Protection of Personal Information***
>
> SOSi personnel must protect their colleagues' personal information and adhere to all data privacy laws. Confidential and/or sensitive information such as a person's contact details, identification numbers, health status, or compensation data should only be used for legitimate business purposes and be accessed by, and communicated to, only those individuals who had a need to know such information.

(GC Exh. 45, p. 6).

> ***Use of Company Assets***
>
> Except as indicated below, SOSi personnel are not permitted to use Company assets including, but not limited to phones, computers, copy machines, fax machines, software, logos, photos or videos, e-mail accounts, office supplies, or vehicles for other than legitimate business purposes.

(GC Exh. 45, p. 10).

> ***Use of Social Media***
>
> Social media should never be used to discuss any information concerning SOSi business or to disclose confidential or proprietary information of the Company or any third party with whom the Company has a relationship. When communicating via social media, SOSi personnel should make clear that any views expressed are their own and not those of the Company. Also, individuals who use social media must refrain from sending any messages that are offensive or embarrassing to the Company or to other people.

(GC Exh. 45, p. 10).

> ***Communication with News Media***
>
> SOSi personnel may occasionally be contacted by media representatives who wish to obtain information about the Company's people, business or other matters. All such inquiries must be directed to SOSi's Media Department. SOSi personnel are not permitted to communicate directly

> with the media unless explicitly authorized to do so. Public statements about SOSi should only be made by designated Company spokespersons.

(GC Exh. 45, p. 11). When the above provisions are read in context with other provisions in the Code of Business Ethics and Conduct, which deal with money laundering, human rights compliance, the prohibition on gifts or bribes to foreign officials, and financial integrity, a reasonable interpreter would not understand this Code as impermissibly limiting Section 7 activity. Rather, the interpreter would view the Code as prohibiting unethical or illegal conduct prohibited by the Immigration Courts or federal law. This conclusion is further bolstered by the introductory sections in the Code, which state that the purpose of the Code is to make sure that SOSi's own employees and contractors comply with the high ethical and legal standards that the federal government requires of all its contractors:

> **OVERVIEW**
>
> SOS International Ltd., its subsidiaries, and affiliates (collectively, "SOSi" or the "Company") are committed to conducting business ethically and in compliance with applicable laws, rules and regulations of the United States ("U.S.") and other jurisdictions in which the Company operates. SOSi's Code of Business Ethics and Conduct (the "Code") summarizes the business practices that embody this commitment.
>
> The Code applies to all SOSi employees and independent consultants worldwide (collectively, "SOSi personnel"). We also expect our agents, subcontractors, suppliers and other business partners to develop and enforce ethics policies that are materially similar to ours.
>
> Unethical or illegal activities could damage SOSi's reputation and result in serious adverse consequences for both the Company and the individuals involved. Therefore, it is essential that SOSi personnel understand and comply with the Code.
>
> **PURPOSE**
>
> The Code sets forth SOSi's expectations regarding ethical conduct of business. In addition to summarizing relevant laws and regulations and Company policies, it addresses our collective moral responsibilities.

> While the Code is not intended to cover every ethical issue or situation that may arise, it provides general guidance regarding SOSi's basic standards of business conduct. More detailed guidance regarding specific topics can be found in SOSi's policies. In cases where no stated guidance is provided in either the Code or in Company policies, SOSi personnel are expected to seek assistance from internal resources.

(GC Exh. 45, p. 3).

Whatever limited impact the Code had on Section 7 rights, SOSi's legitimate business interests outweigh any potential adverse impact. The Code of Business Ethics and Conduct services particularly legitimate interests because the Respondent is a federal contractor and the government requires Respondent to maintain such a code. (Tr. 1303-1305; JX 1(a) ¶ I.1, JX 1(f) ¶ I.1). SOSi requests that this allegation be dismissed.

F. The Akin Gump Letters Did Not Violate Section 8(a)(1).

Paragraph 14 of the Consolidated Complaint alleges that on October 6, 2016, SOSi, through its agent, told interpreters not to discuss their protected activities, interrogated interpreters about their protected activities, and threatened legal action against interpreters because of their protected activities in violation of Section 8(a)(1). These allegations pertain to correspondence sent on October 6 by the law firm of Akin Gump to seventeen interpreters, whom SOSi identified as having inappropriately shared a faulty link containing access to the confidential information of another interpreter. (JX 1(tt), JX 1(uu), Tr. 1354-1356).

Contrary to the General Counsel's allegations, the October 6 letter did not threaten legal or other action against interpreters for discussing or sharing *their own personal ICAs* with other interpreters. Rather, it raised the prospect of legal action for improperly accessing, downloading, and forwarding *personal contract information and data of another interpreter*. (Tr. 1354-1356). Even assuming that the interpreters are employees rather than independent contractors, which

SOSi denies, employees have no statutory right to access or share private personal data of another employee that they know was inadvertently breached. For similar reasons, the statements in the Akin Gump correspondence are not unlawful nor do they constitute unlawful interrogation.

The Board's test for interference, restraint, and coercion under Section 8(a)(1) of the Act is well established. The test is an objective one and depends on "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co.*, 124 NLRB 146, 147 (1959). Employer conduct is thus unlawful if it reasonably tends to interfere with, restrain or coerce employees in the exercise of their Section 7 rights. (*Id.*) Applying this test, the Board has held that when an employer threatens to institute legal action because an employee engaged in protected activity, the employer violates Section 8(a)(1) because those threats reasonably tend to interfere with, restrain, and coerce employees in the exercise of their protected rights. *DHL Express, Inc.*, 355 NLRB 680, 692 (2010); *Three D, LLC*, 361 NLRB No. 31, slip op. at 308 (2014).

However, the Board has held that in situations where an employee obtains confidential company information, including wage data, and later disseminates it to *other persons*, the conduct loses the protection of the Act. Thus, in *IBM Corp.*, 265 NLRB 638, 638 (1982), the Board upheld the discharge of an employee for disclosing wage data that he knew was deemed confidential and that he was not authorized to disclose, even though the information was sent to him anonymously. The Board explained:

> Hudson's activity here fell outside the protection of Sec. 7 not because of his purpose or motive but, rather, because of his method. While Hudson may have "innocently" obtained the Respondent's confidential wage data, he did not "innocently" distribute it, and we see no reason to adopt what is essentially the "finders keepers" rationale advocated by the dissent. The fact of the matter is that Hudson knowingly distributed the Respondent's data, not his own.

IBM Corp., 265 NLRB at 638 n. 4; *see also Cook County College Teachers Union*, 331 NLRB at 118, 122 (employer lawfully disciplined secretary for disclosing confidential directory); *Grocery Carts, Inc.*, 264 NLRB at 1067, 1070-71 (employee lawfully discharged for examining document in manager's desk containing confidential information regarding another employee); *Roadway Express Inc*., 271 NLRB 1238, 1239-40 (1984) (the Act did not protect employee who removed business records "from the Respondent's files and [made] copies of them").

The record reflects that in or around September 18, 2016, SOSi discovered that a faulty link was sent to some interpreters that contained a link to confidential documents relating to interpreter Maria Elena Walker (and others), rather than the recipient's personal contract documents. (Tr. 1337; GC Exh. 293). Upon learning of this error, SOSi sent an email to the interpreters alerting them to the data breach. (GC Exh. 102, Tr. 1338-1339). Thereafter, SOSi undertook an extensive digital forensic examination in an effort to contain the breach to the greatest extent possible. (Tr. 1339-1341, 1348-1350, 1352-1356). This investigation revealed that a number of interpreters who had received the erroneous link had repeatedly accessed and downloaded Walker's personal documents and information and many had forwarded the link to other individuals, including Maria Portillo and Rosario Espinosa. (*Id.*, *see also* R. Exh. 17). As a result, on October 6, 2016, formal cease and desist letters were sent to seventeen interpreters who were particularly egregious in their sharing of the improper link and Walker's personal data. (JX 1(uu), JX 1(tt), Tr. 1354-1356). Given this context and in light of the case law which clearly states that knowingly revealing confidential information is not "protected" under the Act, the Akin Gump letters do not constitute an unlawful threat to bring legal action against "employees."

Further, a close reading of the letters themselves reveals that their words and the context in which they are written do not suggest an element of coercion or interference or unlawful

interrogation. The letters sought legitimate information from the interpreters to assist SOSi in investigating the data breach. The letters stated, in relevant part:

> As you may be aware, SOSi has been investigating an incident where links sent to contractors to facilitate the transmission of their own contracting documents (which contain personal information) were improperly forwarded. We write to advise you that forensic analysis has determined that you are one of the contractors who engaged in this wrongful conduct. *By doing so, you either exposed or accessed personal information in contract documents that did not pertain to you.*
> . . .
>
> *SOSi is taking this matter very seriously and its investigation is ongoing.* No final conclusions have been reached, or decisions made about what action, if any, may be taken. At this time, we ask that you cooperate fully with the company's investigation, as you are obligated to do under your ICA. Please provide to us by no later than 5 p.m. EST on October 10 (1) a list of individuals (including e-mail addresses) to whom you forwarded any SOSi links for uploading or downloading contract documents; (2) a list of individuals (including e-mail addresses) who sent to you any SOSi links for uploading or downloading contract documents; and (3) written confirmation that you have deleted and/or destroyed any confidential or proprietary documents about other contractors that you may have accessed or downloaded from SOSi links.

(GC Exhs. 75, 104 (emphasis added)). The above text does not tell interpreters not to discuss their protected activities, nor does it impermissibly interrogate them about their protected activities. Simply put, the letters reveal a good faith and legitimate effort on SOSi's part to fully investigate and rectify the results of a data breach, not a deliberate and calculated effort to seek information or take other action against interpreters for discussing or sharing *their own personal ICAs* with other interpreters. Given the unique surrounding circumstance of the data breach, it cannot be said that the letters violate Section 8(a)(1). *See Bridgestone Firestone South Carolina*, 350 NLRB 526, 529-530 (2007) (holding that no unlawful interrogation occurred where the employer had a legitimate basis for investigating an employee's misconduct, and where it made reasonable efforts to circumscribe its questioning to avoid unnecessarily prying into the

employee's union views, and where the limitations on its inquiry were clearly communicated to the employee); *see also Fresenius USA Mfg., Inc.*, 362 NLRB No. 130, slip op. at 1 (2015) ("[E]mployers have a legitimate business interest in investigating facially valid complaints of employee misconduct").

SOSi requests that this allegation be dismissed.

G. Alleged Individual Section 8(a)(1) Allegations

As with all other allegations in the consolidated complaint, the § 8(a)(1) allegations regarding Haroon Siddiqi and Martin Valencia fail because the individuals in question were independent contractors. In the case of Siddiqi, the interpreter provided information on her own initiative and without any coercion by Siddiqi. An employer may receive information concerning protected activities, provided it is volunteered. Respondent requests that these allegations be dismissed. *International Union of Operating Engineers, Local No. 948 (Oklahoma Osteopathic Hospital)*, 238 NLRB 1113, 1113 (1978).

CONCLUSION

Respondent requests that the Consolidated Complaint be dismissed in its entirety.

Respectfully submitted this 2nd day of February 2018.

/s/ Charles P. Roberts III

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CERTIFICATE OF SERVICE

I certify that I have this day served this BRIEF on the following persons by electronic mail:

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Dated this 2nd day of February 2018

/s/ Charles P. Roberts III